



The European Union Export Control Regime of Arms : Comment of the Legislation: article-by-article

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Part I: The European Union Export Control Regime of Arms

Introductory Remark:

The common position is an intergovernmental cooperation instrument set up by Article 25 of the Treaty on European Union (TEU). It has to be implemented, by Member States into their national legislations.

A common position or action is not EU law as for example a regulation or a directive. Therefore an implementation thereof by a Member State cannot be considered by the Commission, neither an inappropriate transposition can be examined by the EU Court of Justice.

**Council Common Position 2008/944/CFSP of December 2008
defining common rules governing control of export of military
technology and equipment**

Official Journal L 335/99, 13/12/2008 P. 0099 - 00103

Comment: In 1998 the Council reached political agreement on the EU Code of Conduct on Arms Exports. The Code lays down common criteria for arms exports initially adopted in 1991 as well as so-called no-undercut principle that entails closer cooperation in managing 'essentially identical' transactions. Moreover it includes a denial notification and consultation mechanism.

In December 2008, the Council has adopted the Common Position 2008/944/CFSP defining common rules governing control of export of military technology and equipment which replaces the Code of Conduct. The Common Position has larger scope of application (i.e. brokering activities, transit, intangible transfers) and according to article 29 TEU is legally binding for Member States. However, the legally binding force of the Common Position remains uncertain bearing in mind that the EU Court of Justice has no jurisdiction over the CFSP issues.

It shall be noted that several non-EU countries have officially aligned themselves with the criteria and principles of the Code (i.e. Bosnia and Herzegovina, Canada, Croatia, the Former Yugoslav Republic of Macedonia, Iceland and Norway).

It should be noted that since a few years the COARM endeavours to establish a transparent and confidence-building dialogue with the European Parliament. Hence according to the agreement reached in December 2005 each Presidency should meet the Security and Defence Sub-Committee of the European Parliament Foreign Affairs Committee to brief the Sub-Committee on COARM activities.

Moreover according to Article 13 the User's Guide¹ was adopted by the Council to help Member States' Authorities to apply the Common Position. The User's Guide is subject to annual revision. Thus essential interpretation elements introduced in 2009 have been summarised and integrated in comment and remark sections of this paper.

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty of the European Union, and in particular Article 15 thereof,

Whereas:

- (1) Member States intend to build on the Common Criteria agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992, and on the European Union Code of Conduct on Arms Exports adopted by the Council in 1998.
- (2) Member States recognise the special responsibility of military technology and equipment exporting States.
- (3) Member States are determined to set high common standards which shall be regarded as the minimum for the management of, and restraint in, transfers of military technology and

¹ User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment is available at the following website: <http://register.consilium.europa.eu/pdf/en/09/st09/st09241.en09.pdf>.

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equipment by all Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency.

(4) Member States are determined to prevent the export of military technology and equipment which might be used for internal repression or international aggression or contribute to regional instability.

(5) Member States intend to reinforce cooperation and to promote convergence in the field of exports of military technology and equipment within the framework of the Common Foreign and Security Policy (CFSP).

(6) Complementary measures have been taken against illicit transfers, in the form of the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms.

(7) The Council adopted on 12 July 2002 Joint Action 2002/589/CFSP on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons.

(8) The Council adopted on 23 June 2003 Common Position 2003/468/CFSP on the control of arms brokering.

(9) The European Council adopted in December 2003 a strategy against the proliferation of weapons of mass destruction, and in December 2005 a strategy to combat illicit accumulation and trafficking of SALW and their ammunition, which imply an increased common interest of Member States of the European Union in a coordinated approach to the control of exports of military technology and equipment.

Complementary information: These Strategies implement the requirements prescribed, on the one hand, by the United Nations Programme of Action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects² and, on the other hand, by the European Security Strategy (ESS)³.

European Security Strategy “A secure Europe in a better world” was adopted by the European Council on 12 December 2003. The ESS enunciates five key threats to be faced by the EU Member States, *inter alia*, terrorism, proliferation of weapons of mass destruction (WMD), regional conflicts, state failure and organised crime. It should be emphasised that the WMD proliferation is considered as a main challenge for the EU security and wellbeing. The ESS accentuates that remaining threats are highly influenced by the outcomes of illicit circulation, transfer and manufacture of small arms and light weapons (SALW) and their excessive accumulation and uncontrolled spread.

It shall be noted that the definition of SALW adopted by both Strategies stems from the Annex of Council Joint Action 2002/589/CFSP⁴ which is following:

“The Joint Action shall apply to the following categories of weapons, while not prejudging any future internationally agreed definition of small arms and light weapons. These categories may be subject to further clarification, and may be reviewed in the light of any such future internationally agreed definition.

(a) Small arms and accessories specially designed for military use:

² This Program was adopted on 20 July 2000 during the United Nations Conference on the Illicit Traffic in Small Arms and Light Weapons in All Its Aspects, which was held on 9-20 July 2001 at UN Headquarters in New York. The Program is available at the following website: <http://www.poa-iss.org/poa/poahtml.aspx>.

³ ESS is available on the following website: <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

⁴ See Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP (OJ L 191, 19.7.2002, p. 1).

- *machine-guns (including heavy machine-guns),*
- *sub-machine guns, including machine pistols,*
- *fully automatic rifles,*
- *semi-automatic rifles, if developed and/or introduced as a model for an armed force,*
- *moderators (silencers).*

(b) Man or crew-portable light weapons:

- *cannon (including automatic cannon), howitzers and mortars of less than 100 mm calibre,*
- *grenade launchers,*
- *anti-tank weapons, recoilless guns (shoulder-fired rockets),*
- *anti-tank missiles and launchers,*
- *anti-aircraft missiles/man-portable air defence systems (MANPADS)."*

EU Strategy Against Proliferation of Weapons of Mass Destruction⁵ (EU WMD Strategy) was adopted by the European Council on 10 December 2003. The main purpose of this Strategy is to develop an exhaustive and comprehensive EU plan to combat the proliferation of WMD and missiles capable of delivering such weapons. In order to do so three factors are emphasised:

- Growing threat to international peace and security caused by proliferation of WMD and its means of delivery;
- EU must elaborate an effective multilateral response;
- Instruments to prevent, deter, halt and eliminate proliferation programmes.

EU WMD Strategy implemented in "living action plan" which must be constantly monitored, revised and updated every six months. This plan is based on four pillars:

- Resolute action against proliferation;
- Promotion of stable international and regional environment;
- Close cooperation with the United States and other key partners;
- Development of the necessary structures within the Union which consists in organising a six monthly debate on the implementation of the EU Strategy at the External Relations Council⁶; setting up of a WMD monitoring centre which will supervise the consistent implementation of the EU⁷.

New lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems⁸ were adopted by the European Council on 17 December 2008. This document constitutes an instrument intended to improve the efficiency of implementation of the EU WMD Strategy.

New lines emphasise following objectives for the EU:

- Rising of non-proliferation measures into a transversal priority of EU and Member States' policies;
- Encouraging of existing best practices at the level of Member States' national policies;

⁵ The full text of EU WMD Strategy is available at following website:
<http://register.consilium.europa.eu/pdf/en/03/st15/st15708.en03.pdf>.

⁶ Six-monthly Progress Reports are available at the following website:
<http://www.consilium.europa.eu/showPage.aspx?id=718&lang=en>.

⁷ A concept paper on monitoring and enhancing consistent implementation of the EU strategy against the proliferation of WMD adopted by European Council on 12 December 2006 frames principal task of WMD Monitoring Centre. This concept paper is available at the following website:
<http://register.consilium.europa.eu/pdf/en/06/st16/st16694.en06.pdf>.

⁸ The full text is available on the following website:
<http://register.consilium.europa.eu/pdf/en/08/st17/st17172.en08.pdf>.

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- Encouraging better coordination between national policies of Member States and of existing EU tools and policies;
- Identification of areas where EU action shall be straightened.

The essential grounds of the action plan could be summed up as follows:

- An updated risk and threat evaluation document;
- Models for awareness raising for undertakings, scientific and academic circles, and financial institutions;
- Intensifying cooperation with third countries to help them to improve their non-proliferation policies and export controls;
- Measures to combat intangible transfers of knowledge and know-how, including mechanisms of cooperation in terms of consular vigilance;
- Intensifying efforts to impede proliferation flows and sanction acts of proliferation;
- Intensifying efforts to combat proliferation financing;
- Intensifying coordination/collaboration with, and contribution to, relevant regional and international organisations.

Strategy to Combat Illicit Accumulation and Trafficking of SALW and Their Ammunition⁹ (EU SALW Strategy) was adopted by the European Council on 15-16 December 2005. This Strategy represents EU attempt to combat the dangers stemming from the illicit accumulation and trafficking of SALW and their ammunition.

EU SALW Strategy underlines that the destabilising accumulation and spread of SALW constitutes a growing threat to peace, security and development. It also reminds EU armoury of measures which are essentially represented by the Joint Action 2002/589/CFSP as well as various CFSP and ESDP instruments.

Action Plan

Action Plan constitutes the main achievement of EU SALW Strategy; it must be constantly monitored and revised in terms of an interim report on its implementation provided by the Presidency. This plan contains following means of action:

- International action (support of ratification of international instruments aimed at combating illicit trafficking or at tracing and marking of SALW);
- Regional action (support of regional initiatives, notably ECOWAS Moratorium, Nairobi Convention and SADC Protocol);
- Action in the framework of agreements/structured dialogues (integration of SALW subject in the neighbourhood policy, in EU structured dialogues with main exporters);
- Action within the Union (Joint Action 2002/589/CFSP, EU's 2003 Common Position on brokerage, and harmonised application of the Code of Conduct on Arms Exports).

(10) The UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects was adopted in 2001.

(11) The United Nations Register of Conventional Arms was established in 1992.

Complementary information: The United Nations Register of Conventional Arms (UNROCA) is one of the essential mechanisms to strengthen the transparency of international arms transfers. It was established by the UN General Assembly Resolution 46/36L, 6 Dec.

⁹ EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition is available at the following website: <http://register.consilium.europa.eu/pdf/en/06/st05/st05319.en06.pdf>.

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1991 to “to prevent the excessive and destabilizing accumulation of arms [...] in order to promote stability and strengthen regional or international peace and security”.

Thus the States are invited to report on annual basis on the import and export of seven categories of major conventional weapons:

- battle tanks;
- armoured combat vehicles;
- large calibre artillery systems;
- military aircraft/unmanned aerial vehicles;
- military and attack helicopters;
- warships;
- missiles and missile systems; and
- small arms and light weapons – man-portable weapons made or modified to military specification for use as lethal instruments of war (since 2003).

Information to be provided includes quantity and type of weapons as well as exporting/importing state. States might also submit a description of the item, additional comments on the transfer and background¹⁰.

(12) States have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter.

(13) The wish of Member States to maintain a defence industry as part of their industrial base as well as their defence effort is acknowledged.

Complementary information: Up until 2009 the European defence market was characterised by diversity of national legislations that strongly hindered the supply between Member States. Moreover, national licensing systems often made no distinction between exports to third countries and transfers to Member States.

Therefore the Directive 2009/43/EC concerning transfers of defence-related products within the EU¹¹ constitutes a progress towards a completion of EU market for defence technology and equipment while preserving Member States' essential security interests.

Article 4 establishes the main principle of the Directive according to which transfers of defence-related products between Member States should be subject to prior authorisation and that no supplementary authorisation should be required for passage through or for entrance onto the territory of other Member State.

Article 9 introduces a certification of defence undertakings in the EU. Certification is granted by national competent authorities and has to be mutually recognised. It attests the reliability of the recipient undertaking, more precisely its capacity to observe export limitations of defence-related products received from another Member State under a transfer licence and incorporated in another defence-related product or, if necessary, prevent by other means such products from leaving the EU.

¹⁰ For complementary information see the website of UN Office for Disarmament Affairs (UNODA): <http://www.un.org/disarmament/convarms/Register/HTML/RegisterIndex.shtml>.

¹¹ Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (OJ L 146, 10.6.2009, p. 1).

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In addition, the Directive sets up different types of transfer licences (i.e. general, global and individual) as well as provisions on information exchange.

Member States will have to implement the Directive 2009/43/EC by 30 June 2011 at the latest and apply those measures from 30 June 2012.

(14) The strengthening of a European defence technological and industrial base, which contributes to the implementation of the Common Foreign and Security Policy, in particular the Common European Security and Defence Policy, should be accompanied by cooperation and convergence in the field of military technology and equipment.

(15) Member States intend to strengthen the European Union's export control policy for military technology and equipment through the adoption of this Common Position, which updates and replaces the European Union Code of Conduct on Arms Exports adopted by the Council on 8 June 1998.

(16) On 13 June 2000, the Council adopted the Common Military List of the European Union, which is regularly reviewed, taking into account, where appropriate, similar national and international lists.

(17) The Union must ensure the consistency of its external activities as a whole in the context of its external relations, in accordance with Article 3, second paragraph of the Treaty; in this respect the Council takes note of the Commission proposal to amend Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual use items and technology,

HAS ADOPTED THIS COMMON POSITION:

Article 1, 2, 3 and 4 of the Common Position

Article 1

1. Each Member State shall assess the export licence applications made to it for items on the EU Common Military List mentioned in Article 12 on a case-by-case basis against the criteria of Article 2.

Comment: According to User's Guide the *export licence* is a formal authorisation issued by the national licensing authority to export or transfer military equipment on a temporary or definitive basis. Export licences include:

- licences for physical exports, including where these are for purpose of licensed production of military equipment;
- brokering licences;
- transit or transshipment licences;
- licences for any intangible transfers of software and technology by means such as electronic media, fax or telephone (See point 2.5.4).

In other words, with regard to the issue of defence technology and equipment, the concept of "export licence" covers both intra- and extra- EU transfers. Therefore an authorisation will be necessary to export an military item to another EU Member State or to a third country. Hence the defence trade remains largely within the competence of Member States even if a few initiatives have been initiated to establish the EU defence market (See comment on Recital 13).

Data on export licences and refusals per destination, per region and worldwide is available in the Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment which is published in the 'C' series of the Official Journal of the European Union. (See also comment on Article 8(2)).

The Eleventh Annual report was published in Official Journal of the EU (OJ C 9, 13.1.2011, p. 1). In order to see the dynamic of EU military export, the summary of the data provided is following:

- Central America and the Caribbean 273 licences and 13 refusals;
- Central Asia 234 licences and 6 refusals;
- European Union 19 080 licences, no information on refusals;
- Middle East 6 002 licences and 80 refusals;
- North Africa 792 licences and 15 refusals;
- North America 8 386 licences and 1 refusal;
- North East Asia 3 080 licences and 55 refusals;
- Oceania 2 390 licences, no information on refusals;
- Other European Countries 8 284 licences and 105 refusals;
- South America 1 713 licences and 24 refusals;
- South Asia 4 520 licences and 80 refusals;
- South East Asia 3 322 licences and 44 refusals;
- Sub-Saharan Africa 1 937 licences and 54 refusals;
- Worldwide 62 482 licences and 408 refusals.

The information on brokering licenses granted and denied per Member State is also accessible through the Annual Report. It contains separate tables for each Member State including data on destination, number of licences issued, the value of licences issued in Euros, ML category, quantity of brokered items and country of origin.

Article 1, 2, 3 and 4 of the Common Position

In 2009, 9 brokering licences were refused by:

- Bulgaria (Cuba, ML 11, Criteria 2, 3 and 8);
- UK (Cameroon, ML 3a; Honduras ML 1a; Guatemala, ML 1a; Kenya; Bangladesh ML 1b; Sierra Leone ML 6a); and
- Germany (Brazil, ML 22, Criterion 7; Russian Federation, ML 13, Criterion 7).

2. The export licence applications as mentioned in paragraph 1 shall include:

- applications for licences for physical exports, including those for the purpose of licensed production of military equipment in third countries,
- applications for brokering licences,

Comment: According to User's Guide *brokering activities* are activities of persons and entities:

- negotiating or arranging transactions that may involve the transfer of items on the EU Common Military List from a third country to any other third country.
- who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country (See point 2.5.3).

It should be noted that before the entry into force of the Common Position 2008/944/CFSP the main EU legislation for brokering issue was the Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering¹². It established a frame of control for technical assistance where it is provided outside the EU by a natural or legal person established in the EU and is or might be intended for the WMD-related or military end-use. Currently, several provisions of the Council Common Position 2003/468/CFSP, in particular these on information sharing, remain applicable; however they should be read in light of the Common Position 2008/944/CFSP. Thus the COARM has agreed that the information sharing commitments set out in Common Position 2003/468/CFSP should be implemented via the mechanism laid down in Common Position 2008/944/CFSP.

Moreover, the Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items¹³ also gives a definition of brokering activities. Article 2(3), paragraph 2 considers as *brokering services* an arrangement of transfer of items on the EU Common List of military equipment from a third country to any other third country. However, the term "arrange the transfer" was not specifically defined which might leave a room for manoeuvre for Member States' appreciation or interpretation.

Contrary to the Common Position 2008/944/CFSP, Article 2(5) of the Regulation 428/2009 specifies that "**ancillary services**" such as transportation, financial services, insurance or re-insurance, or general advertising or promotion, are excluded from the definition of brokering services. Hence, a parallel can be drawn between "arrange the transfer" and "ancillary services", which can potentially guide Member States in elaboration of their national legislations implementing the Regulation.

International instruments took the initiative to control auxiliary services in other fields of strategic control.

¹² OJ L 156, 25.06.2003, p. 79.

¹³ Council regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (Recast) (OJ L 134, 29.05.2009, p. 1).

Article 1, 2, 3 and 4 of the Common Position

The UN General Assembly adopted on 8 December 2005 the Resolution 60/81 which requested Secretary General to appoint a Group of Governmental Experts in order to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons (SALW) and to submit a report on the outcome of its study. After numerous consultations with UN Member States, the Group of Experts submitted a required report emphasising a necessity to regulate activities closely associated with brokering in SALW¹⁴.

As concerns EU law, ancillary services are regularly covered by Council Decisions implementing resolution of the UN Security Council on restrictive measures against a third states. These provisions do not explicitly include nor exclude brokering activities related to ancillary services. The Council uses more vague wording and speaks about “direct or indirect” supply of controlled items. As long as brokering activities consist in an indirect supply of items including transport and financial services, brokering of ancillary services could be considered as covered by these specific Council Decisions as it is, for example, the case for the Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria¹⁵:

Article 1.2: “it shall not apply to:

- a) provide, directly or indirectly, technical assistance, brokering services or other services related to the items referred to in paragraph 1 or related to the provision, manufacture, maintenance and use of such items, to any natural or legal person, entity or body in, or for use in, Syria;
- b) provide, directly or indirectly, financing or financial assistance related to the items referred to in paragraph 1, including in particular grants, loans and export credit insurance, for any sale, supply, transfer or export of such items, or for the provision of related technical assistance, brokering services or other services to any natural or legal person, entity or body in, or for use in, Syria;
- c) participate, knowingly and intentionally, in activities, the object or effect of which is to circumvent the prohibitions referred to in points (a) or (b).”

- applications for "transit" or "transshipment" licences,

Comment: “transit” and “transshipment” are not defined by this Common Position. Given that the distinction between these two terms is not very clear, they are sometimes used indifferently to qualify the same operation. Nevertheless, the User’s Guide to the EU Code of Conduct on Arms Export has defined the terms “transit” and “transshipment”:

- “*Transit is the movements in which the goods (military equipment) merely pass through the territory of the Member State*”;
- “*Transshipment is a transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading (generally) onto another exporting means of transport*”. In this regard transshipment should be understood as a part of transit operation.

- applications for licences for any intangible transfers of software and technology by means such as electronic media, fax or telephone.

¹⁴ The report of group of Group of Governmental experts can be found at following website: www.grip.org/bdg/pdf/g0974.pdf

¹⁵ Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria (OJ L 121, 10.05.2011, p. 11).

Article 1, 2, 3 and 4 of the Common Position

Comment: The export authorisation for an item listed covers the minimum technology necessary for the installation, operation, maintenance and repair of the items supplied. It also provides operating instructions and some basic specifications. An everyday parallel could be a technical manual supplied with a television or washing machine. If such technology is exported apart it will require an authorisation.

Moreover, an authorisation might also be necessary if:

- the technology will support a complete system, but the items exported are components of that system;
- the technology related to a previous authorisation, but not essentially different from the technology that was originally supplied (i.e. handbooks or publications concerning the equipment that has been upgraded since its original supply).

Member States' legislation shall indicate in which case an export licence is required with respect to these applications

Article 2 Criterion One

Article 2

1. **Criterion One:** Respect for the international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.

An export licence shall be denied if approval would be inconsistent with, *inter alia*:

- (a) the international obligations of Member States and their commitments to enforce United Nations, European Union and Organisation for Security and Cooperation in Europe arms embargoes;
- (b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;
- (c) the commitment of Member States not to export any form of anti-personnel landmine;
- (d) the commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and The Hague Code of Conduct against Ballistic Missile Proliferation.

Comment: According to the User's Guide, the main purpose of Criterion 1 is to ensure that sanctions decided by international regimes are respected. To evaluate if an export might be inconsistent or not with international obligations and commitments Member States should firstly consult different information sources at their disposal (common EU database, EU denial database, EU watch list, international regimes database and others documentation available through United Nations, IAEA...).

The User's Guide detailed the elements (point (a) to (d) of the Criterion 1) to take into consideration by Member States' Authorities while assessing the consistency of an application with their international obligations:

- To enforce the **UN, OSCE and EU arms embargoes**. Member States should carefully check if the final destination and end-user are subject to these. As concerns legally binding UN sanctions, in order to assure unified EU interpretation of the scope of UN embargoes Member States should refer either to the Council Common Position or to the Council Regulation, which incorporate such sanctions into EU law. An interpretation is left to the discretion of Member States for non-legally binding UN and OSCE sanctions.

- Under the **Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention**. The User's Guide contains a short description of these instruments, their legal force and scope of application as well as a set of indicators to be taken into consideration by national authorities while assessing a licence application.

- **Not to export any form of anti-personnel landmine**. Member States Parties to the Ottawa Convention on Anti-Personnel Mines or those which have taken a political commitment not to export such mines should deny an export authorisation for such mines unless for purpose of their destruction (Poland and Finland did not ratify the Convention).

- In the framework of the **Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and the Hague Code of Conduct Against Ballistic Missile Proliferation**. The User's Guide contains a short description of these instruments, their legal force and scope of application as well as a set of indicators to be taken into consideration by national authorities while assessing a licence application.

For complementary information see point 3.1.3 of the User's Guide as revised in 2009.

Article 2 Criterion Two

2. **Criterion Two:** Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.

- Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall:

- (a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;
- (b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe;

Comment: The User's Guide largely analyses and comments this criterion focusing on the respect of human rights. The following terms are defined more precisely:

Recipient country's attitude towards relevant human rights principles (as redrafted by the present Common Position): it includes the policy line of the government of the recipient State, past record of the proposed end-user, recent significant developments, including *inter alia* the impact of "fight against terrorism"; effective constitutional protection of human rights; human rights training among key actors (e.g. law enforcement agencies); impunity for human rights violations; independent monitoring bodies and national institutions for promotion or protection of human rights.

The User's Guide has adopted a list of indicators to assess the recipient country's attitude toward human rights and fundamental freedoms:

- The commitment of the recipient country's government to respect and improve human rights and to bring human rights violators to justice;
- The implementation record of relevant international and regional human rights instruments through national policy and practice;
- The ratification record of the country in question with regard to relevant international and regional human rights instruments;
- The degree of cooperation with international and regional human rights mechanisms (e.g. UN treaty bodies and special procedures);
- The political will to discuss domestic human rights issues in a transparent manner, for instance in the form of bilateral or multilateral dialogues, with the EU or with other partners including civil society (See point 3.2.3 of the User's Guide).

International human rights instruments (this provision was supplemented by User's Guide as revised in 2009): a non-exhaustive list of the main international and regional instruments is contained in the Annex II of the User's Guide (See point 3.2.4 of the User's Guide).

The recipient country's attitude. The following indicators should be taken into account when assessing a country's respect for, and observance of all human rights and fundamental freedoms:

- The commitment of the Government to respect and improve human rights and fundamental freedoms;
- The implementation record of relevant international and regional human rights instruments through national policy and practice;
- The ratification record of the country in question with regard to relevant international and regional human rights instruments;

Article 2 Criterion Two

- The degree of cooperation with international and regional human rights mechanisms (e.g. UN treaty bodies and special procedures);
- The political will to discuss domestic human rights issues in a transparent manner with the EU or with other partners including civil society (See point 3.2.5 of the User's Guide).

Serious violations of human rights (this provision was supplemented by User's Guide as revised in 2009): the qualification of a human rights violation as "serious" has to be assessed for each situation on its own merits and on a case-by-case basis, taking into account all relevant aspects. Relevant factor in the assessment is the character/nature and consequences of the violation in question. Systematic and/or widespread violations of human rights underline the seriousness of the human rights situation. However, violations do not have to be systematic or widespread in order to be considered as "serious" for the Criterion 2 analysis. According to Criterion 2, a major factor in the analysis is to consider whether the competent bodies of the UN, the EU or the Council of Europe (as listed in Annex III of the User's Guide) have established that serious violations of human rights have taken place in the recipient country. In this respect it is not a prerequisite that these competent bodies explicitly use the term "serious" themselves; it is sufficient that they establish that violations have occurred. Member States should however assess if these violations are considered as serious in the present context. Likewise, a lack of decision of supranational authorities should not preclude Member States from the possibility to make an independent estimation as to whether such serious violations have occurred (See point 3.2.6 of the User's Guide).

Clear risk that the proposed export might be used for internal repression (this provision was supplemented by User's Guide as revised in 2009)

Criterion gives a set of examples of what constitutes an internal repression. However, assessing whether or not there is a clear risk that the proposed export might be used to commit or facilitate such acts requires a detailed analysis. The combination of "clear risk" and "might" should be emphasised. Such wording requires a lower burden of evidence than a "clear risk" that equipment **will** be used for internal repression.

The risk analysis should be based upon a case-by-case consideration of available evidence of the history and current prevailing circumstances in the recipient State/regarding the proposed end-user, as well as any identifiable trends and/or future events that might reasonably be expected to precipitate conditions that might lead to repressive actions (e.g. forthcoming elections). Some initial questions that might be asked are:

- Has the behaviour of the recipient State/ the proposed end-user been highlighted negatively in EU Council statements/conclusions?
- Have concerns been raised in recent reports from EU Heads of Mission in the recipient State/regarding the proposed end-user?
- Have other international or regional bodies (e.g. UN, Council of Europe or OSCE) raised concerns?
- Are there any consistent reports of concern from local or international NGOs and the media?

A particular weight should be given to the current situation in the recipient State before confirming any analysis. It may be the case that abuses have occurred in the past but that the recipient State has taken steps to change practices in response to domestic or international pressure, or an internal change in government took place. Following interrogations might be raised:

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- Has the recipient State agreed to external or other independent monitoring and/or investigations of alleged repressive acts?
- If so, how has it reacted to/implemented any findings?
- Has the government of the recipient State changed in manner that gives confidence of a change in policy/practice?
- Are there any EU or other multilateral or bilateral programmes in place aimed at bringing about change/reform?

Mitigating factors such as improved openness and an on-going process of dialogue to address human rights concerns in the recipient State may lead to the possibility of a more positive assessment. However, it is important to recognise that a lengthy passage of time since any highly publicised instance of repression in a recipient State is not on its own a reliable measure of the absence of clear risk. There is no substitute for up-to-date information from reliable data sources if a proper case-by-case assessment is to be made (See point 3.2.7 of the User's Guide).

The nature of the military technology or equipment: any assessment of equipment under Criterion 2 has to be realistic (i.e. are the items in question really useable as a tool of repression?). In addition, it is important to recognise that a wide variety of equipment has a track record of use which can eventually favour the fulfilment or facilitate repressive acts. Items such as Armoured Personnel Carriers (APCs), body armour and communications/surveillance equipment can have a strong role in facilitating repression (Point 3.2.8 of the User's Guide).

The end-user has to be carefully considered. If intended for the police or security forces, it is important to establish the exact branch of these forces in a recipient State thereto the items are to be delivered. It should also be noted that there is no strict rule as to which branches of the security apparatus may have a role in repression. For example, the army may have a role in some States, while in others it may have no record of such a role.

Some initial questions might include:

- Is there a record of this equipment being used for repression in the recipient state or elsewhere?
- If not, what is the possibility of it being used in the future?
- Who is the end-user?
- What is the end-user's role in the recipient state?
- Has the end-user been involved in repression?
- Are there any relevant reports on such involvement? (See point 3.2.9 of the User's Guide).

For these purposes, technology or equipment which might be used for internal repression will include, *inter alia*, technology or equipment where there is evidence of the use of this or similar technology or equipment for internal repression by the proposed end-user, or where there is reason to believe that the technology or equipment will be diverted from its stated end-use or end-user and **used for internal repression**. In line with Article 1 of this Common Position, the nature of the technology or equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, *inter alia*, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

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Comment: According to User's Guide an assessment of the likelihood of **diversion** might include following questions:

- Does the stated end-user have a legitimate need for this equipment? Or are the items in question more appropriate to another branch of the security apparatus?
- Would we issue a licence if the end-user were another part of the security apparatus of the recipient state?
- Do the different branches of the security forces have separate procurement channels? Is there a possibility that equipment might be redirected to a different branch? (See point 3.2.13).

- Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

- (c) deny an export licence if there is a **clear risk** that the military technology or equipment to be exported might be used in the commission of **serious violations of international humanitarian law**.

Comment: International humanitarian law (IHL) establishes a scope of rules applicable in times of armed conflict, which seek to protect people who are not/no longer taking part in the hostilities and to regulate the conduct of hostilities. The main instruments of IHL are the four Geneva Conventions of 1949 and their additional protocols¹⁶, completed by a number of specific treaties (See Annex IV to Chapter 3 Section 2 of the User's Guide). A lack of ratification of the IHL instruments by the recipient State along with an absence of national legislation required should make the national authorities more vigilant during the assessment of a licence application.

According to User's Guide, *serious violations of international humanitarian law* include infringements of:

- Four Geneva Conventions (Art. 50 GC I; Art. 51 GC II; Art. 130 GC III; Art. 147 GC IV);
- Additional Protocol I (Art. 11 and 85);
- Rome Statute of the International Criminal Court (Art. 7 and 8)¹⁷.

In assessing the potential serious violation of IHL in the country of final destination the national authorities light ask the following questions:

- Have violations been committed by any actor for which the State is responsible? (i.e. state organs, including armed forces; persons or entities empowered to exercise elements of government authority; persons or groups acting in fact on its instructions or under its directions or control violations committed by private persons or groups which it acknowledges and adopts as its own product).
- Has the recipient country failed to take action to prevent and suppress violations committed by its nationals or on its territory?
- Has the recipient country failed to investigate violations allegedly committed by its nationals on its territory?
- Has the recipient country failed to search and to prosecute (or extradite) its nationals to

¹⁶ The four Geneva Conventions of 1949 and their additional protocols are available on the website of the International Committee of the Red Cross: <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>.

¹⁷ Rome Statute of the International Criminal Court of 17 July 1998 is available on the website of the International Committee of the Red Cross: <http://www.icrc.org/ihl.nsf/FULL/585?OpenDocument>.

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those on that territory responsible for violations of IHL?

- Has the recipient country failed to cooperate with other State, ad hoc tribunals or the International Criminal Court in connections with criminal proceedings relating to violations of IHL? (See point 3.2.11 of the User's Guide).

As regards *clear risk* the User's Guide specifies that an assessment should comprise an overview of the recipient's past and present record of respect for IHL, the recipient's intentions as expressed through a formal commitments **and** the recipient's capacity to ensure that the equipment is used in consistency with the IHL and is not diverted. It should be kept in mind that the isolated incident of IHL violations might not by themselves constitute a basis to for denial. For a list of supplementary questions see point 3.2.12 of the User's Guide.

Article 2 Criterion Three

3. Criterion Three: The **internal situation** in the country of final destination, as a function of the existence of **tensions** or armed conflicts.

Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

Comment: It should be kept in mind that if there is an armed conflict or if there are internal tensions in the country of destination, a careful analysis should be carried out concerning the eventual risk that the proposed export might provoke a wider conflict. Particular attention should be given to the role of the end-user in this conflict.

The User's Guide establishes a list of information sources for Member States Authorities, such as common EU base of information (EU HOM reports, EU reports, EU Council statements/conclusions), EU Watchlist (destinations deserving particular vigilance) and EU denial database (see point 3.3.2).

The User's Guide has also defined some key concepts:

Internal situation refers to the economic, social and political developments and stability within the borders of the country of final destination. The Common Position 2008/944/CFSP also refers to the "country of final destination" as the "recipient country".

Function of the existence of tensions or armed conflicts

Tensions refers to unfriendly or hateful relations between different groups, or groups of individuals, of the society based either on race, colour, sex, language, religion, political or other opinion, national or social origin, interpretation of historic events, differences in economic wellbeing or ownership of property, sexual orientation, or other factors. Tensions could be at the origin of tumult or violent actions, or a cause for the creation of private militia not controlled by the State.

Armed conflicts refers to the escalation of the tensions between groups to the level in which any of the groups uses arms against others.

Moreover, the competent authority must assess the internal situation of the country of destination; possible participation and role of the end-user in the internal conflict or tensions and the probable use of the proposed export in the conflict. In assessing the potential risks in the recipient country the competent authority might ask the following questions:

- What is the end-use of the proposed export (military technology or equipment)? Would the export be used to enforce internal security or to continue with the hostilities?
- Is the military equipment or technology intended to support internationally-sanctioned peace-keeping/peace enforcing operations or humanitarian interventions?
- Is the end-user participating or closely related to a party involved in the armed conflict within the country? What is the role of the end-user in the conflict?
- If components or spares are being requested, is the recipient state known to operate the relevant system in armed conflict in the country?
- Have there been recent reports that the existing tensions might be aggravating? Is there a risk that the existing tensions might turn into an armed conflict when one or more of the participants gain access to the military equipment and technology to be exported?
- Is the recipient country subject to regional or UN embargoes because of the internal situation thereof (see also Criterion 1)?

Article 2 Criterion Three

The nature of equipment should be appreciated in order to see if it is related, directly or indirectly, to the tensions or conflicts in the country of final destination. This will be all the more important when there is already an existing armed conflict.

Some questions to consider might be:

- Is the nature of export in such, that it is or could be used in an armed conflict within the country of final destination?
- Is there a risk that the existing internal tensions might turn into an armed conflict when the proposed end-user obtains access to this military equipment and technology?

The end-user also plays an important role in the analysis. Therefore it is important to establish exactly for which branch of the armed forces, police or security forces the export is intended. For example, in a recipient country the army and police might be involved in an armed conflict in which the navy has no role. In this respect, the risk of internal diversion should also be considered.

More complex cases arise when equipment may be going to **a research institute or private company**. Here a judgment should be made on the **likelihood of diversion**, and the views on Criterion 3 should be based on the other criteria, specifically concerns related to Criterion 7, the risk of diversion.

The following questions might be considered:

- What is the end-user's role in the recipient state? Is the end-user part of the problem, or rather attempting to be part of the solution?
- Is the end-user involved in the internal armed conflict or tensions?
- Are there any relevant reports of such involvement?

Article 2 Criterion Four

4. **Criterion Four:** Preservation of regional peace, security and stability.

Member States **shall deny** an export licence if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim.

When considering these risks, EU Member States will take into account inter alia:

- a) **the existence or likelihood of armed conflict between the recipient and another country;**
- b) **a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;**
- c) **the likelihood of the military technology or equipment being used other than for the legitimate national security and defence of the recipient;**
- d) **the need not to affect adversely regional stability in any significant way.**

Comment: The Criterion makes a distinction between the intention to use the proposed export for aggressive as opposed to defensive purposes. It is not intended to preclude exports to countries that are (potential) victims of aggression or a threat of aggression. A careful assessment would need to be carried out as to whether there are sound indications of an intention by the intended recipient country to use the proposed export to attack, potentially attack or threaten to attack another country.

The User's Guide establishes a list of information sources for Member States Authorities, such as common EU base of information (EU HOM reports, EU reports, EU Council statements/conclusions), EU SitCen (Country Risk Assessment), EU Watchlist (destinations deserving particular vigilance) and EU denial database (see point 3.4.2).

The User's Guide has also defined some key concepts:

Preservation of regional peace, security and stability: This criterion addresses the issue of whether the recipient state has intentions to use or threaten to use the proposed export aggressively against another country. An assessment should therefore be made of the recipient's intentions, as well as whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, and assist in international peace-keeping and humanitarian operations.

Licence applications to sensitive and potentially sensitive destinations are carefully assessed on a case-by-case basis, especially when the export destination regards a country that is or has been involved in armed conflict. When analysing whether there is a clear risk, the history of armed conflict and the current prevailing circumstances in the recipient state and the region should be taken into consideration, as well as any identifiable trends and/or future events that might reasonably be expected to heighten tensions or lead to aggressive actions.

The wording **shall deny** (the Code of Conduct used the wording **will not issue**) means that if in the assessment of a licence application it has been established that there is a clear risk that the proposed export would be used aggressively against another country or to assert by force a territorial claim, the export licence must be denied regardless of the outcome of the analysis with respect to the other criteria set out in Article 2 of the Common Position, or any other considerations.

When considering these risks, Member States will take into account inter alia:

- (a) the existence or likelihood of armed conflict between the recipient and another country**

Article 2 Criterion Four

For the purposes of this element, a judgement will have to be made as to whether there is a clear risk that this equipment will be used in an existing armed conflict between the recipient country and its neighbours or another conflict in the region. Where there is no armed conflict, the regional situation should be considered. Growing tensions in the region, increased threats of conflict or weakly held peace arrangements are examples of whether there is a likelihood of a conflict, putting at risk the preservation of the regional peace, security and stability. In these cases, a judgement would need to be made as to whether there is a clear risk that supplying this piece of equipment would hasten the advent of conflict, for instance by giving the recipient country an advantage over its neighbours or others in the region. Where the equipment to be exported might add to the military capability of the recipient country, a judgement will have to be made as to whether there is a clear risk that this equipment will prolong an existing conflict or bring simmering tensions into armed conflict.

The following questions are indicators that may be taken into consideration as appropriate:

- Is there an existing conflict in the region?
- Is the current situation in the region likely to lead to an armed conflict?
- Is the threat of conflict theoretical/unlikely or is it a clear and present risk?

(b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force

An assessment should be made on whether there is a clear risk that the recipient country will by armed conflict or threat of force assert a territorial claim on a neighbouring country. Such territorial claim might be stated as an official position or be voiced by official representatives or relevant political forces of the recipient country and could relate to land, sea or aerial space. The neighbouring country does not have to be the direct neighbour of the recipient country.

When making a judgement any recent claims by the recipient country on another's territory should be factored in. Where the recipient country has tried in the past to pursue by force a territorial claim or has threatened to pursue a territorial claim, a judgement should be made as to whether the nature of this equipment will let it seem probable, that it would be used in such a case and as to whether it would give the recipient country an additional capability to try to pursue again this claim by force, thus destabilising the region.

The following questions are indicators that may be taken into consideration as appropriate:

- Is the recipient country pursuing a claim against the territory of a neighbouring country?
- Has a territorial claim led to conflict in the region, or underlying tensions between the recipient country and its neighbours?
- Has the recipient country tried to resolve the issue through peaceful means, has it tried in the past to assert by force its territorial claim, or has it threatened to pursue its territorial claim by force?

(c) the likelihood of the military technology or equipment would be likely to being used other than for the legitimate national security and defence of the recipient

When assessing this element of Criterion 4, the exporting state should estimate whether the recipient state has expressed an aggressive military doctrine, and the likelihood of the requested equipment being used in accordance with this doctrine. The exporting state should also estimate whether the requested equipment is compatible with, or constitutes a necessary addition to or replacement of, existing armament systems in the defence forces of the

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recipient state. It may also be relevant to take into account the quantity and quality of the equipment to be exported.

(d) the need not to affect adversely regional stability in any significant way

A judgement on this Criterion will have to be made on whether supplying the recipient country with the equipment will significantly improve military capability thereof, and if it does, would a neighbouring country as a result be put under threat of conflict. Where there are existing tensions in the region, would supplying of this equipment enhance the recipient country's military capability by introducing a new piece of equipment into the region which could threaten a neighbouring country.

The following questions are indicators that may if appropriate be taken into consideration:

- Why does the recipient wish to acquire the equipment or technology?
- Is this equipment simply a replacement or it is destined for maintenance for existing items that might be old or in disrepair, or is the recipient developing new capabilities, such as a significantly improved air strike capability?

The nature of the equipment should be analysed to see whether there is a clear risk that the equipment can be used in a conflict between the recipient country and its neighbours. This will be used to a greater extent where there are regional tensions or armed conflicts. Where tensions exist, the type of equipment is all the more important as the equipment could significantly increase the recipient country's capability to move to armed conflict or threaten armed conflict. Could a neighbouring country be moved to increase its arms imports due the export of this equipment? Given tensions in certain regions, an export could be seen as an increase in threat to a neighbouring country; therefore consideration of this question becomes vital.

Some questions to consider might be:

- Would the recipient's capability be enhanced by the export, and if so, would it be enhanced to the point where existing powers balance would be upset? Given the circumstances in the recipient country and its intentions, would an enhanced capability present a clear risk of hastening the advent of conflict?
- Would a neighbouring country feel threatened by the military technology or equipment to be exported?
- Is there a risk that the existing regional tensions might turn into an armed conflict when one or more of the participants obtain access to this military equipment and technology?
- Is the export in nature such, that it is or could be used in an armed conflict within the region? What is the likelihood of this equipment being used in a conflict?

A judgement on ***the end-user*** would have to be made on whether he would allow this equipment to be used in a manner inconsistent to Criterion 4. If it is going directly to the military/government, a decision has to be made on whether the equipment will be used in any military action against another country.

More complex cases arise when equipment may be going to a **research institute or private company**. Here a judgement should be made on the **likelihood of diversion**, and views on Criterion 4 should be based on the other criteria, specifically concerns related to Criterion 7, and the risk of diversion.

The following questions might be considered:

- Is the export likely to be deployed in conflict with a neighbouring state? Or would it most likely go to the Police/a UN contribution, or some other branch of the security forces not

Article 2 Criterion Four

directly connected to the Criterion 4 concerns? (See point 3.4.3 of the User's Guide).

Article 2 Criterion Five

5. **Criterion Five:** The national security of the member states and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries

Member States will take into account:

- a) **the potential effect of the military technology and equipment to be exported on their defence and security interests as well as those of Member States and those of friendly allied countries, while recognising that this factor cannot affect consideration of the criteria on respect of human rights and on regional peace, security and stability;**
- b) **the risk of use of the military technology and equipment concerned against their forces or of Member States and those of friendly allied countries.**

Comment: The User's Guide lays down a list of information sources relating to the ***national security of Member States and of territories whose external relations are the responsibility of a Member State, and to defence interests***, such as UN Charter, NATO Treaty, Council of Europe, etc (see point 3.5.2).

Unlike the other seven criteria, which draw Member States' attention to a particular aspect of the country of destination deemed to be source of risk, Criterion 5 requires the Member States to carry out an analysis focused on a parameter specific to them: their national security and that of friends, allies and other Member States.

User's Guide analysis of "key concepts" of Criterion 5 could be summarised as follows:

National Security refers to the capability of the Member States to ensure territorial integrity, protect the population and preserve national security interests as well as the resources and supplies deemed essential for its subsistence and its independence vis-à-vis all kind of threats and attacks.

According to the European Security Strategy, the principal **EU threats** include terrorism (religious extremism, electronic networks), proliferation of weapons of mass destruction, regional conflicts (violent or frozen conflicts which persist on EU borders, threatened minorities), State failure (corruption, abuse of power, weak institutions, lack of accountability, civil conflict), organised crime (cross border trafficking in drugs, women, illegal migrants and weapons, maritime piracy) (see comment on Recital 9 of Common Position 2008/944/CFSP).

National security must also be assessed by taking account of **international (or collective) security**, which is among the aims pursued by the Charter of the United Nations.

Territories whose external relations are the responsibility of a Member State:

- Territories covered by **Article 5 of the NATO Treaty**;
- The **outermost regions**: the four French overseas departments (Guadeloupe, French Guiana, Martinique, Réunion); the Portuguese autonomous regions of the Azores and Madeira in the Atlantic Ocean; the Spanish autonomous community in the Canary Islands in the Atlantic Ocean);
- The **overseas** countries and territories covered by Article 198 to 204 of the Treaty of Lisbon (former Article 182 to 188 of the TEC), and listed in Annex II of the Treaty of Lisbon (former Annex II of TEC);

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- European territories to which the provisions of the TFEU apply under certain conditions (Article 355 TFEU).

Allied countries refers to countries associated by treaty or an international agreement providing for:

- solidarity clause: mobilisation in case of terrorist attack or of a natural or man-made disaster (Article 222 TFEU); or
- or mutual defence clause: aid and assistance in the event of an armed attack on one of the Member States (Article 42(7) TEU). Other examples of mutual defence clause are Article 5 of the NATO Treaty (except for Sweden, Ireland, Cyprus, Malta, Austria and Finland).

Friendly countries covers countries with which a Member State maintains a close or long standing bilateral relationship, particularly in the field of defence and security, or with which it shares values and interests and pursues common objectives. The User's Guide establishes a number of criteria to determine whether a country may be considered as a friend, such as the number of persons holding the dual nationality, the presence of European nationals, the existence of language community, the number of trade agreements and cooperation agreements, etc.

Potential effect of the export of the military technology and equipment can be:

- Positive: if the proposed export helps to reinforce the national security (i.e. defence and security interests) of friends, allies and other Member States. In this case the *a priori* assessment should be favourable, however without detriment to the evaluation of Criteria 2 and 4.
- Negative: if the proposed export would directly or indirectly threaten the defence and security interests of friends, allies and other Member States. In this case the *a priori* assessment should be unfavourable. (See point 3.5.8.1).

Defence and security interests should be analysed by a national authorities of the Member State in terms of the possible impact on the security of its forces when deployed out of area.

Operational risk under criterion 5b should be analysed with respect to following considerations:

(a) Is there a direct threat to the security of the forces of a Member State or those of a friendly or allied countries?

(b) Is there a risk that military technology or equipment will be diverted of a force or body which is hostile to the interests or forces of a Member State, friend or ally?

- Should be taken into account the existence of terrorist groups, organisations engaged in armed struggle against those currently in power, or organised crime networks which might use the equipment in activities which could be inconsistent with the criteria of this Common Position. (See also comment on Criteria 7).

(c) Does the recipient country have the technical capacity to use the equipment?

- **Technical capacity** refers to the ability of the recipient country to make effective use of the equipment to be exported, both in material and human terms as well as to the technological level of the recipient country and its operational capacity. Following questions could be considered:

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- *Does the recipient country have the military infrastructure to be able to make effective use of the equipment?
- *Is the technological level of the equipment requested proportionate to the needs expressed by the recipient country and to its operational capacity?
- *Is similar equipment already in service well maintained?
- *Are enough skilled personnel available to be able to use and maintain the equipment.

(d) Member States could also carry out impact studies on a case-by-case basis which could include following questions:

- The nature of equipment: whether it is directly offensive in character, the technological superiority which it would confer on the forces possessing it, its autonomy of use, the increase in operational performance which the equipment would allow;
- Any distinction in the doctrine for the use of the equipment, depending on the user;
- The nature of the operations: war between conventional forces, asymmetric war, civil war, etc. (See point 3.5.9).

Article 2 Criterion Six

6. **Criterion Six:** behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law.

Member States will take into account, *inter alia*, the record of the buyer country with regard to:

- a) its support or encouragement of terrorism and international organised crime;
- b) its compliance with its international commitments, in particular on the non-use of force, and with international humanitarian law;
- c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to point (b) of Criterion One.

Comment: This criterion focus essentially on current and past record of the recipient country with regard to its attitude to terrorism and international organised crime, the nature of its alliances, its respect for international commitment and law, concerning in particular the non-use of force, International Humanitarian Law and WMD non-proliferation, arms control disarmament.

The User's Guide includes a list of information sources which might guide national licensing authorities in the assessment of Criterion 6. In addition to EU Heads of Mission reports and UN Security Council Resolutions, Member States could obtain information from their diplomatic missions, UN and other international and regional bodies and agencies, etc. (See point 3.6.2. and Annex I to Chapter 3 Section 6).

This criterion has to be considered for buyer countries whose Government exhibit negative behaviour with respect to the points a)-c) of the Criterion 6. Therefore the specific identity and the nature of the end-user or the equipment to be exported are not the main focus. The main focus is the **behaviour of the buyer country** more than any consideration of the risk that a particular transfer might have particular negative consequences.

The User's Guide lays down a number of key concepts to consider when examining requests in terms of Criterion 6 such as:

Buyer's country's support of terrorism and international organised crime.

- **Terrorism**, which should be understood as terrorist acts, prohibited under international law, such as deliberate attacks of civilians, indiscriminate attacks, hostage taking, torture or deliberate and arbitrary killings, when the purpose of such attacks is to intimidate a population or to compel a government or an international organisation to commit or to abstain from committing any act.

- **International organised crime** concerns activities such as drug trafficking, trade in human beings, illegal immigrant smuggling, trafficking in nuclear and radioactive substances, money laundering, conducted by a structured group of person, existing for a period of time and acting in concert with the aim of committing serious crimes or offences established in accordance with the UN convention against Trans-national Organised Crime

Following questions might be asked:

- Does a buyer country have a record of past or present terrorist/criminal activities?
- Are there any known or suspected links between the buyer country and terrorist/criminal organizations or any reasons to suspect that entities within, and tolerated by the buyer country have those links?

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- Is there any other reason to suspect that the buyer country tolerates re-export or diversion of military technology or equipment to terrorist/criminal organizations, or that it organizes re-export or diversion itself?
- Does the buyer country have internal legislation that tolerates terrorist/criminal activities, or does failure to apply legislation result in tolerance of terrorist/criminal activities? (See point 3.6.4).

Nature of buyer country's alliances.

The term **alliance** should be interpreted in a wider sense and include all those economic, military and defence agreements which are aimed at establishing a significant connection (intended also as common political aims) between two or more States. It also includes any shared vision of international relations; which will result in a significant action intended to pursue a mutual goal.

Member States might ask among other questions:

- Does the buyer country belong to an alliance founded or acting against a Member State or against an allied or friendly country?
- Does the buyer country belong to an alliance that does not respect or promote the respect of the founding principles of the UNO.
- Does the buyer country belong to an alliance that acts for the destabilisation of the international community? (See point 3.6.5).

Buyer's country compliance with its international commitments.

Attention should be paid to those commitments that are legally binding for every State as both norms of international law and norms of treaty universally accepted by every State, including commitments which by their nature could be violated (i.e. non-use of force, or respect of international law during a conflict) in most cases by using military technology or equipment.

Member States should also consider:

- Does the buyer country respect its commitments to enforce UN, OSCE, and EU arms embargoes?
- Does the buyer country use, has it used, or is it threatening to use force in violation of Article 41 of the UN Charter, in order to solve an international crisis?
- Does the buyer country normally infringe international common law commitments, or treaties which it has voluntarily signed?
- Does the buyer country behave in a manner so as to exclude itself from the international community of states? (See point 3.6.6).

Buyer's country commitment to non-proliferation and other areas of arms control and disarmament.

In particular, Member States should examine both the buyer's country internal legislation and its international commitments. In addition to conventions included in Criterion 1, Member States might also ask the following:

- Does the recipient country report to the UN Register of Conventional Arms, if not, why not? (See also comment on UN Register of Conventional Arms).
- Has the recipient country aligned itself with the principles of Common Position 2008/944/CFSP or similar regional conventions?
- Is the recipient country involved in the Conference on Disarmament?
- Does the recipient country apply effective export and transfer controls encompassing dedicated control legislation and licensing arrangements that conform to international norms?

Article 2 Criterion Six

- **Nature of buyer alliance**, which should be understood in a large sense as to include all those economic, military and defence agreements, which, by their nature are aimed at establishing a significant connection between two or more states.

Article 2 Criterion Seven

Criterion Seven: Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions.

In assessing the impact of the military technology or equipment to be exported on the recipient country and the risk that such technology or equipment might be diverted to an undesirable end-user, the following shall be considered:

- a) **the legitimate defence and domestic security interests of the recipient country, including any participation in United Nations or other peace-keeping activity;**
- b) **the technical capability of the recipient country to use such technology equipment;**
- c) **the capability of the recipient country to exert effective export controls;**
- d) **the risk of such technology or equipment being re-exported to undesirable destinations, and the record of the recipient country in respecting any re-export provision or consent prior to re-export which the exporting Member State considers appropriate to impose;**
- e) **the risk of such technology or equipment being diverted to terrorist organisations or to individual terrorists;**
- f) **the risk of reverse engineering or unintended technology transfer.**

Comment: As regards Criterion 7, a particular attention should be paid to the information exchange which might be organised through the cooperation in COARM, or by any other channels. In addition, the User's Guide contains a set of information on diversionary risks (See point 3.7.2. and Annex I to Chapter 3 Section 7).

The User's Guide analyses a few keys concepts, which should be taken into account in any assessment. It should be kept in mind that diversion can be initiated at various levels, it can take place within a country or can involve detour or retransfer to a third "unauthorised" country. It can be of possession (end-user) and/or function (end-use).

(a) The legitimate defence and domestic security interests of the recipient country, including any participation in United Nations or other peace-keeping activity

All nations have the right to defend themselves according to the UN Charter (Article 51). Nonetheless, an assessment should be made of whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, or to assist in United Nations or other peace-keeping activity. The following questions might be asked:

- Is there a plausible threat to security that the planned arms import could meet?
- Are the armed forces equipped to meet such a threat?
- What will the destination be of the imported goods after the participation in UN or other peace-keeping activity has been terminated?

The information on the exports to UN-mandated or other national missions in 2009 is available in the Twelfth Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment¹⁸. (See comment relative to Article 8(2)).

The table contains general information on destination country, EU exporter, UN mission and the description of goods without the number specification.

Article 2 Criterion Seven

(b) The technical capability of the recipient country to use the equipment

It can be a key indicator of the “existence of a risk” of diversion. A proposed export that appears technically beyond what one might normally expect to be deployed by the recipient state may be an indication that a third-country end-user is in fact the intended final destination. This concept applies equally to complete goods and systems, as well as components and spares. The export of components and spares where there is no evidence that the recipient country operates the completed system in question may be a clear indicator of other intent.

Some questions that might be asked are:

- Is the proposed export high-tech in nature?
- If so, does the recipient have access to, or is it investing in, the appropriate technical backup to support the sale?
- Does the proposed export fit with the defence profile of the recipient state?
- If components or spares are being requested, is the recipient state known to operate the relevant system that incorporates these items?

(c) The capability of the recipient country to exert effective export controls

Recipient states’ adherence to international export control norms can be a positive indicator against either deliberate or unintentional diversion. Some questions that might be asked are:

- Is the recipient state a signatory or member of key international export control treaties, arrangements or regimes (e.g. Wassenaar)?
- Does the recipient country report to the UN Register of Conventional Arms; if not, why?
- Has the recipient country aligned itself with the principles of the Council Common Position 2008/944/CFSP or similar regional arrangements?
- Does the recipient country apply effective export and transfer controls encompassing dedicated control legislation and licensing arrangements that conform to international norms?
- Is stockpile management and security of sufficient standard?
- Are there effective legal instruments and administrative measures in place to prevent and combat corruption?
- Is the recipient state in the proximity of conflict zones or are there on-going tensions or other factors within the recipient state that might mitigate against the reliable enforcement of their export control provisions?
- Does the country of stated end-use have any history of diversion of arms, including the re-export of surplus equipment to countries of concern?

(d) The risk of such technology or equipment being re-exported to undesirable destinations, and the record of the recipient country in respecting any re-export provision or consent prior to re-export which the exporting Member State considers appropriate to impose (as redrafted by the present Common position)

The competent authority should assess the reliability of the specific consignee:

- Is the equipment intended for the government or an individual company?

If the importer is the government:

- Is the government/the specific government branch reliable in this respect?
- Has the government/the specific government branch honoured previous end-user certificates?
- Is there any reason to suspect that the government/the specific government branch is not reliable?

Article 2 Criterion Seven

If the importer is a company:

- Is the company known?
- Is the company authorised by the government in the recipient state?
- Has the company previously been involved in undesirable transactions?
- Does the recipient country have the technical capacity to use the equipment?

Technical capacity refers to the ability of the recipient country to make effective use of the equipment in question, both in material and human terms. It also refers to the technological level of the recipient country and its operational capacity, and generally to the standard of performance of its equipment. Consequently, examination of the compatibility of an export of military technology or equipment with respect to this technical capacity should include consideration of whether it is opportune to deliver to the recipient equipment which is more sensitive or sophisticated than the technological means and operational needs of the recipient country.

(e) The risk of such technology or equipment being re-exported or diverted to terrorist organisations or to individual terrorists (as redrafted by the present Common Position)

In assessing the potential risk in the recipient state, the competent authority might ask the following questions:

- Does the recipient state have a record of past or present terrorist activities?
- Are there any known or suspected links to terrorist organisations (or even individual terrorists) or any reason to suspect that entities within the recipient state participate in the financing of terrorism?
- Is there any other reason to suspect that the arms might be re-exported or diverted to terrorist organisations?

In addition to the considerations pursuant to point (a) – (d) the competent authority should also assess the reliability of the specific consignee:

- Is the equipment intended for the government or an individual company?

If the importer is the government:

- Is the government/the specific government branch reliable in this respect?
- Has the government/the specific government branch honoured previous end-user certificates?
- Is there any reason to suspect that the government/the specific government branch is not reliable?

If the importer is a company:

- Is the company known?
- Is the company authorised by the government in the recipient state?
- Has the company previously been involved in undesirable transactions?

(f) The risk of reverse engineering or unintended technology transfer (as redrafted by the present Common Position, previously this key concept was part of Criterion 5)

When the Member States are deciding on an export licence application, account must be taken of the capabilities of the recipient, whether State or private, to analyse and to divert the technology contained in the military equipment being acquired. The Member States will be able to exchange the relevant information with a view to establishing the capabilities of a potential purchaser of European military equipment.

Article 2 Criterion Seven

In this context, and particularly for equipment which uses sensitive technology, the following factors must be considered:

- The sensitivity and the level of protection of the technologies contained in the system, as regards the estimated level of expert knowledge of the recipient, and the evident desire of that recipient to acquire some of those technologies;
- The ease with which those technologies could be analysed and diverted, either to develop similar equipment, or to improve other systems using the technology acquired;
- The quantities to be exported: the purchase of a number of sub-systems or items of equipment which appears to be under (or over) estimated is an indicator of a move to acquire technologies;
- The past behaviour of the recipient, when that recipient has previously acquired systems which it has been able to examine to obtain information about the technologies used in those systems. In this context, the Member States may inform one another about the cases of technology theft which they have experienced.

In order to determine this compatibility, Member States could consider the following questions:

- Does the recipient country have the military infrastructure to be able to make effective use of the equipment?
- Is the technological level of the equipment requested proportionate to the needs expressed by the recipient country and to its operational capacity?
- Is similar equipment already in service well maintained?
- Are enough skilled personnel available to be able to use and maintain the equipment? Are there a high proportion of the country's engineers and technicians already working in the military sector? Is there a shortage of engineers and technicians in the civilian sector that could be aggravated through additional recruitment by the military sector?

Article 2 Criterion Eight

Criterion Eight: Compatibility of the exports of military technology or equipment with the **technical and economic capacity** of the recipient country, taking into account the desirability that states should meet their **legitimate security and defence needs** with the **least diversion of human and economic resources for armaments**.

Member States will take into account, in the light of information from relevant sources such as United Nations Development Programme, World Bank, International Monetary Fund and Organisation for Economic Cooperation and Development reports, whether the proposed export would seriously **hamper the sustainable development** of the recipient country. They shall consider in this context the recipient country's **relative levels of military and social expenditure**, taking into account also any EU or bilateral **aid**.

Comment: Criterion 8 is expected only to apply when the stated end-user is a government or a public sector entity, because it is only in respect of these end-users that the possibility of diverting scarce resources from social and other spending could occur.

The User's Guide outlines a two-stage "filter" system to help Member States identify export licence applications which may require assessment against Criterion 8 (See Annex A to Chapter 3 Section 8). If this system indicates that further analysis is required there is a list of social and economic indicators for Member States to take into account (See Annex B to Chapter 3 Section 8).

Moreover following terms are defined by the Guide:

Economic capacity refers to the impact of the arms import on the availability of the financial and economic resources of the recipient state for others purposes, in the immediate, medium and long term. In this regard Member States might take into account following questions:

- Both the capital cost of the arms purchase and the likely follow-on 'life-cycle' costs of related operation (e.g. ancillary systems and equipment), training and maintenance;
- Whether the arms in question are additional to existing capabilities or are replacing them, and, where appropriate, the likely savings in operating costs of older systems;
- How the import will be financed by the recipient country and how this might impact on its external debt and balance of payments situation (See point 3.8.4a).

Technical capacity refers to the ability of the recipient country to make effective use of the equipment in question, both in material and human terms. In this regard, Member States should consider the following questions:

- Does the recipient country have the military infrastructure to be able to make an effective use of the equipment?
- Is similar equipment already in service well maintained?
- Is enough skilled personnel available to be able to use and maintain the equipment? (See point 3.8.4b).

Legitimate needs of security and defence require from Member States to conduct an assessment of whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, and assist in international peace-keeping and humanitarian operations. The following questions should be considered by Member States:

- Is there a plausible threat to security that the planned arms import could meet?
- Are the armed forces equipped to meet such a threat?
- Is the planned arms import a plausible priority considering the overall threat? (See point 3.8.5).

Article 2 Criterion Eight

Least diversion for armaments of human and economic resources is a matter of judgement, taking all relevant factors into consideration.

Member States should consider inter alia the following questions:

- Is the expenditure in line with the recipient country's Poverty Reduction Strategy or programmes supported by the International Financial Institutions (IFIs)?
- What are the levels of military expenditure in the recipient country? Has it been increasing in the last five years?
- How transparent are state military expenditures and procurement? What are the possibilities or democratic or public involvement in the state budget process?
- Is there a clear and consistent approach to military budgeting? Is there a well-defined defence policy and a clear articulation of a country's legitimate security needs?
- Are more cost-effective military systems available? (See point 3.8.6).

Relative levels of military and social expenditure. Member States should consider the following questions in assessing whether the purchase would significantly distort the level of military expenditure relative to social expenditure:

- What is the recipient country's level of military expenditure relative to its expenditure on health and education?
- What is the recipient country's military expenditure as a percentage of Gross Domestic Product (GDP)?
- Is there an upward trend in the ratio of military expenditure to health and education and to GDP over the last five years?
- If the country has high levels of military expenditure, does some of this "hide" social expenditure? (e.g. in highly militarised societies, the military may provide hospitals, welfare, etc).
- Does the country have significant levels of "off-budget" military expenditure (i.e. is there significant military expenditure outside the normal processes of budgetary accountability and control)? (See point 3.8.7).

Member States should take into account the level of ***Aid Flows*** to the importing country and their potential fungibility (fungibility refers to the potential diversion of aid flows into inappropriate military expenditure).

- Is the country highly dependent on multilateral as well as EU and bilateral aid?
- What is the country's aid dependency as a proportion of Gross National Income? (See point 3.8.7).

An assessment of the ***cumulative impact*** of arms imports on a recipient country's economy can only be made with reference to exports from all sources, but accurate figures are not usually available. Each Member State may wish to consider the cumulative impact of its own arms exports to a recipient country, including recent and projected licence requests. It may also wish to take into account available information on current and planned exports from other EU Member States, as well as from other supplier States. Potential sources of information are, *inter alia*, the EU Annual Report, Member States' annual national reports, the Wassenaar Arrangement, the UN Arms Register and the annual reports of the Stockholm International Peace Research Institute.

Data on cumulative arms exports may be used to inform a more accurate assessment of:

- Historical, current and projected trends in a recipient country's military expenditure, and how this would be affected by the proposed export;
- Trends in military spending as a percentage of the recipient country's income, and as a

Article 2 Criterion Eight

percentage of its social expenditure. (See point 3.8.9).

Article 3

Article 3

This Common Position shall not affect the right of Member States to operate more restrictive national policies.

Article 4

1. Member States shall circulate details of applications for export licences which have been denied in accordance with the criteria of this Common Position together with an explanation of why the licence has been denied. Before any Member State grants a licence which has been denied by another Member State or States for an essentially identical transaction within the last three years, it shall first consult the Member State or States which issued the denial(s). If following consultations, the Member State nevertheless decides to grant a licence, it shall notify the Member State or States issuing the denial(s), giving a detailed explanation of its reasoning.

Comment: The implementation of the no-undercut principle lays on the information received by Member States Authorities. If a denial has been notified by one Member State to the others and if another Member State receives an export application for an essentially identical transaction, he has, prior his decision, to consult the Member State who has issued the denial. If it has doubts whether or not the considered export application is an “essentially identical transaction”¹⁹, it should initiate a consultation in order to clarify the situation. The User’s Guide contains extensive guidelines on consultation procedure (See points 1.4.10-1.4.18).

The consultation deadline is 3 weeks from the date of transmission of the consultation request, unless otherwise agreed between the parties concerned. If the consulted Member State has not responded within this time, it is presumed to have no objection to the licence application.

The consulting Member State should inform all Member States, of its decision on the licence application, including a brief statement of its reasoning. The consulting Member State should send this notification within 3 weeks of reaching a decision.

The information on a total number of consultations initiated and total number of consultations received by each Member State in 2009 as well as the table showing a total number of consultations for each destination concerned in 2009 are available in the Twelfth Annual Report (See comment relative to Article 8(2)). Hence 105 consultations were initiated by Member States in 2009. States that induced the highest amount of the consultations are, *inter alia*, India 13, Pakistan 7 and Yemen 7.

It should be emphasised that strictly speaking, **the result of the consultation is not legally binding.**

In case of a licence being refused on the basis of national policy that is stricter than that required under the Common Position, a DN could be issued “for information only”. Such DN would be added to the central database, but it will remain de-activated. In other words, it will not require the potential application of the no-undercut principle.

2. The decision to transfer or deny the transfer of any military technology or equipment shall remain at the national discretion of each Member State. A denial of a licence is understood to take place when the Member State has refused to authorise the actual sale or export of the

¹⁹ In order to determine whether a transaction is “essentially identical” should be assessed the technical specifications, the quantities and volumes and the customers and end-users of the goods concerned (See point 1.1.5 of the User’s Guide).

Article 4

military technology or equipment concerned, where a sale would otherwise have come about, or the conclusion of the relevant contract. For these purposes, a notifiable denial may, in accordance with national procedures, include denial of permission to start negotiations or a negative response to a formal initial enquiry about a specific order.

Comment: According to User's Guide practices currently differ between Member States as to when their companies approach to their government authorities to get export permissions (i.e. need of formal export licence application; early non-binding indications).

Each request should meet has to respect formal requirements before a formal response can be given and, if negative, notifies as a denial by the government authority. Thus a request without certain factual information or a brief request over the telephone or an e-mail will not be considered as an application. A denial should be notifies when the government authority has refused an application for export approval made in writing (email, fax or letter) with a certain degree of precision giving enough information on which to base a decision.

A minimum level of information that should be contained in a written request is:

- country of destination;
- full description of the goods concerned, including quality and where appropriate technical specifications;
- buyer (specifying whether the buyer is a government agency, branch of the armed forces, paramilitary force or a private natural or legal person);
- proposed end-user (See point 1.1.4 of the User's Guide).

A denial notification (DN) **should be issued** when:

- a Member State revokes an extant export licence;
- a Member State denies an export licence that is relevant to the scope of the Common Position, and has already circulated a DN relating to this denial in other international export control regimes;
- a Member State refused an export transaction deemed essentially identical to a transaction previously refused by another Member State and notified as a denial. In order to determine whether a transaction is "essentially identical" should be assessed the technical specifications, the quantities and volumes and the customers and end-users of the goods concerned (See point 1.1.5 of the User's Guide).

A denial notification **should not be issued** if:

- an application for approval has either not been made in writing or has not provided all required information (See point 1.1.4 of the User's Guide).

The User's Guide lays down an extensive description of information elements to be included in a denial notification on export licence and on arms broker registration.

Thus a denial notification document should contain:

- Identification number;
- Country of final destination;
- Date of notification;
- Contact details for more information;
- Short description of the goods;
- Control List reference;
- Stated end-use;

- Consignee and end-user;
- Reason for notification of denial/amendment/revocation;
- Additional remarks;
- Origin country of the goods
- Broker's name and details;
- Information element(s) to be amended;
- New information element(s);
- Effective date of amendment or revocation. (See point 1.2.2 and Annex Form 1-3 of the User's Guide).

Up until 2009 the information exchange on DNs was provided by the Council Secretariat which on a monthly basis used to send to Member States, via appointed persons in their Permanent Representations in Brussels, a disc containing the latest version of the database. The procedure established in 2009 stipulates that the Council Secretariat will hand a disc containing the latest version of the database to a representative of each Member State at meetings of the Working Party on Conventional Arms Exports (COARM). This procedure will remain in force until remote access to a secure database is possible (See point 1.4.9 of the User's Guide).

Contrary to the former Code of Conduct on arms exports, the scope of the Common Position covers brokering activities, transit, transshipment and intangible transfers of technology. Hence all procedures for circulation, handling and storage of DNs equally apply to those transactions. However, brokering DNs should be clearly identified on the database by the Council Secretariat (See point 1.4.19-1.4.20 of the User's Guide).

3. Member States shall keep such denials and consultations confidential and not use them for commercial advantage.

Article 5

Export licences shall be granted only on the basis of reliable prior knowledge of end use in the country of final destination. This will generally require a thoroughly checked **end-user certificate** or appropriate documentation and/or some form of official authorisation issued by the country of final destination. When assessing applications for licences to export military technology or equipment for the purposes of production in third countries, Member States shall in particular take account of the potential use of the finished product in the country of production and of the risk that the finished product might be diverted or exported to an undesirable end user.

Comment: The User's Guide defines a common core of elements that should appear in an **end-user certificate** when it is required by a Member State:

Minimum elements of that **should** be included in the end-user certificate:

- Exporter's details (at least name, address and business name);
- End-user's details (at least name, address and business name). In the case of an export to a firm which resells the goods on the local market, the firm will be regarded as the end-user;
- Country of final destination;
- Description of the goods being exported (type, characteristics), or reference to the contract concluded with the authorities of the country of final destination;
- Quantity and/or value of the exported goods;
- Signature, name and position of the end-user;
- Date of the end-user certificate;
- End-use and/or re-export clause if appropriate;
- Indication of the end-use of the goods;
- An undertaking, where appropriate, that the goods being exported will not be used for purposes other than declared use;
- An undertaking, where appropriate, that the goods will not be used in the development, production or use of a weapon of mass destruction or for missiles capable of delivering such weapons.

Others elements that **might** be required by Member State Authorities, **at their discretion**, are *inter alia*:

- A **clause prohibiting re-export** of the goods covered in the end-user certificate. Such clause could, among other requirements, contain:

- * a pure and simple ban on re-export;
- * a provision that re-export will be subject to agreement in writing of the authorities of the original exporting country;
- * a permission for re-export without the prior authorisation of the authorities of the exporting country to certain countries identified in the end-user certificate.

- Full details, where appropriate, on the intermediary;
- If the end-user certificate comes from the government of the country of destination of the goods, the certificate will be attested by the authorities of the exporting country in order to check the authenticity of the signature and the capacity of the signatory to make commitments on behalf of its government;
- A commitment by the final consignee to provide the exporting State with a Delivery Verification certificate upon request.

Assessment of application for incorporation and re-export

The Common Position should be fully applied to licence applications where it is understood that the goods are to be incorporated into products for export. An assessment of such applications should include following considerations:

- the export control policies and effectiveness of the export control system of the incorporating country;
- the importance of their defence and security relationship with that country;
- the materiality and significance of the goods in relation to the goods into which they are to be incorporated and in relation to any end-use of the finished products which might give rise to concern;
- the ease with which the goods, or significant parts of them could be removed from the goods into which they are to be incorporated;
- the standing entity to which the goods are to be exported (See point 2.2.1 of the User's Guide).

Post-shipment verification

Whereas the export controls mainly focus of the pre-licensing phase, post-shipment control also represents an important tool to strengthen the effectiveness of national arms export control.

Post-shipment measures, such as on-site verification or delivery verification certificates, are especially efficient to prevent diversion of re-export under undesirable conditions. Member States are invited to share information on their national provisions adopted to implement post-shipment controls (See point 2.4.1 of the User's Guide).

The export of controlled equipment for humanitarian purposes

In post-conflict areas, certain items can make important contributions to the safety of the civilian population and to economic reconstruction. Such exports are not necessarily inconsistent with the criteria set out in Article 2 of the Common Position and will be considered on a case-by-case basis. Member States will require adequate safeguards against misuse of such exports and, where appropriate, provisions for repatriation of the equipment (See point 2.4.1 of the User's Guide).

Article 6

Without prejudice to Regulation (EC) No 1334/2000, **the criteria in Article 2 of this Common Position and the consultation procedure provided for in Article 4 are also to apply to Member States in respect of dual-use goods and technology** as specified in Annex I to Regulation (EC) No 1334/2000 where there are serious grounds for believing that **the end-user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country**. References in this Common Position to military technology or equipment shall be understood to include such goods and technology.

Comment: This Article has to be read presently in connection with Article 12(1)(c) of the Council Regulation (EC) 428/2009 (repealing and replacing the Regulation 1344/2000). Nevertheless, it is not clear how both provisions (the one of the Regulation and the one of the Common Position) might interfere. Shall Member States take into consideration when assessing an export application for dual-use the eight criteria of the Common Position if the end-user will be the armed force of the recipient States? If politically such mechanism might be required, the Common Position cannot legally extend the Member States' obligation to consider such criteria in the consultation mechanism for an essentially identical transaction previously denied established by Article 13 neither extend the criteria list of Article 12 of the Dual-Use Regulation.

Article 7

In order to maximise the effectiveness of this Common Position, Member States shall work within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of exports of military technology and equipment.

Article 8

1. Each Member State shall circulate to other Member States in confidence an annual report on its exports of military technology and equipment and on its implementation of this Common Position.
2. An EU Annual Report, based on contributions from all Member States, shall be submitted to the Council and published in the 'C' series of the *Official Journal of the European Union*.
3. In addition, each Member State which exports technology or equipment on the EU Common Military List shall publish a national report on its exports of military technology and equipment, the contents of which will be in accordance with national legislation, as applicable, and will provide information for the EU Annual Report on the implementation of this Common Position as stipulated in the User's Guide.

Comment: Annual Reports, which review the Code implementation by Member States, are being adopted by the Council since 1999. They are available at the following website: <http://www.consilium.europa.eu/showPage.aspx?id=1484&lang=en>

Twelfth Annual Report defining common rules governing control of exports of military technology and equipment was published in Official Journal C 9, 13.1.2011, p. 1. This Report broaches the implementation of the Council Common Position 2008/944/CFSP by the Member States and contains several tables on the practical application thereof.

Since a few years the Annual Report keeps a similar structure composed of three parts.

The first part concerns the ***implementation of Council Common Position 2008/944/CFSP***. This part includes a number of paragraphs on practical implementation of the Common Position, such as national provisions of Member States that transpose the Common Position, a summary of recent amendments of the User's Guide and of the Common Military List.

A particular interest is dedicated to the outreach activities. The European Union asserts the promotion of principles and criteria of Common Position 2008/944/CFSP among third countries. Thus a number of outreach seminars were organised on the basis of Joint Action 2008/230/CFSP involving Eastern European and Caucasian countries and Balkans. Other events were organised in the context of Council Decision 2009/1012/CFSP²⁰ and Council Decision 2009/42/CFSP²¹.

In the framework of political dialogue meetings, troika meetings with Canada, Norway, the Russian Federation, Ukraine and the United States were held under the several presidencies.

The Report also puts forward the latest achievements in the developments related to the Arms Trade Treaty, arms brokering and intra-community transfers.

²⁰ Council Decision 2009/1012/CFSP of 22 December 2009 [on support for EU activities in order to promote the control of arms exports and the principles and criteria of Common Position 2008/944/CFSP among third countries](#) (OJ L 348, 29.12.2009, p. 16).

²¹ Council Decision 2009/42/CFSP of 19 January 2009 [on support for EU activities in order to promote among third countries the process leading towards an Arms Trade Treaty, in the framework of the European Security Strategy](#) (OJ L 17, 22.1.2009, p. 39).

The second part examines a *state of play concerning the implementation of other priority measures identified in the previous annual report* (i.e. eleventh annual report).

Finally the third part lays down the *priority guidelines for COARM for the near future*. The following areas were identified as requiring a consolidation:

1. ensuring EU coordination and input in the negotiating process on the Arms Trade Treaty, providing expert contribution for the preparation of the spring 2011 session of the Preparatory Committee;
2. ensuring the implementation of Council Decision 2010/336/CFSP on EU activities in support of the Arms Trade Treaty including through the participation of COARM experts in outreach regional seminars;
3. ensuring that all Member States have adopted the appropriate national laws or administrative rules to fully implement:
 - Common Position 2003/468/CFSP on the control of arms brokering;
 - Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment;
4. ensuring efficient, effective and worthwhile outreach events as provided for in Council Decision 2009/1012/CFSP;
5. continued exchanges of information on arms export policies towards particular destinations;
6. updates of/additions to the User's Guide and EU Common Military List;
7. continued dialogue with the European Parliament and NGOs;
8. early finalisation and publishing of the 13th EU annual report on arms exports;
9. contribution to discussions on the transposition into national legislation of Directive 2009/43/EC on intra-Community transfers of defence-related products, in order to ensure that security concerns are not jeopardised, and that implementation is as harmonised as possible throughout the EU.

Annexes of the Report contain information on conventional arms exports and implementation of Common Position 2008/944/CFSP by the Member States over the period 1 January to 31 December 2009. The following tables are available:

- Tables setting out exports and license refusals per destination, per region and worldwide (See Article 1(1));
- Table showing exports to United Nations-mandated or other national missions in 2008 (See Article 2(7)(a));
- Table providing information on brokering licenses granted and denied per Member State (See Article 3 of Common Position 2003/468/CFSP);
- Table showing a total number of consultations initiated and total number of consultations received by each Member State in 2009 (See Article 4(1));
- Table showing a total number of consultations for each destination concerned in 2008 (See Article 4(1));
- Information on national legislation implementing Common Position 2003/468/CFSP on the control of arms brokering and Common Position 2008/944/CFSP defining common rules for the control of the exports of military technology and equipment or, for those Member States which have not yet fully implemented these Common Positions, providing information on the state of play (see Article 12);
- Table of outreach activities carried out by the EU and Member States (1 January 2009 to 30 June 2010) (see Article 11);
- Table showing Internet addresses for national reports on Arms Exports.

Article 9

Member States shall, as appropriate, assess jointly through the CFSP framework the situation of potential or actual recipients of exports of military technology and equipment from Member States, in the light of the principles and criteria of this Common Position.

Article 10

While Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, these factors shall not affect the application of the above criteria.

Article 11

Member States shall use their best endeavours to encourage other States which export military technology or equipment to apply the criteria of this Common Position. They shall regularly exchange experiences with those third states applying the criteria on their military technology and equipment export control policies and on the application of the criteria.

Comment: the information on the outreach activities carried out by the EU and Member States from 1 January 2009 to 30 June 2010 is available in the Twelfth Annual Report (See comment relative to Article 8(2)).

The information is provided on target/host country and date, on Member State providing assistance/outreach and on description of assistance/outreach. In total, 16 outreach activities were initiated in 2009-2010.

Article 12

Member States shall ensure that their national legislation enables them to control the export of the technology and equipment on the EU Common Military List. The EU Common Military List shall act as a reference point for Member States' national military technology and equipment lists, but shall not directly replace them.

Comment: The Common Military List of the European Union was laid down by the Council in June 2000. The last version thereof was adopted on 15 February 2010 (OJ C 69, 18.3.2010, p. 19).

Table 1: Information on national legislation implementing Common Position 2003/468/CFSP and Common Position 2008/944/CFSP or, for those Member States which have not yet fully implemented these Common Positions, providing information on the state of play

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25.6.2003, p. 79)		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13.12.2008, p. 99)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Austria	Foreign Trade Act (AussHG, Federal Gazette I No. 50/2005) and War Material Act (KMG Federal Gazette I no. 540/1977 as amended by Federal Gazette I No. 50/2005).	Implementation completed.	Foreign Trade Act (AussHG, Federal Gazette I No. 50/2005) and War Material Act (KMG Federal Gazette I no. 540/1977 as amended by Federal Gazette I No. 50/2005)	Implementation completed.
Belgium	Law of 25 March 2003, article 12, (published in Moniteur belge of 7.7.2003, modifying law of 5.8.1991).	Patial implementation.	Law of 26 March 2003 (published in Moniteur belge of 7.7.2003, modifying law of 5.8.1991).	Under review.
Bulgaria	Latest amendments: Law on export control of arms and dual use items and technologies into force 5.02.2007. Regulation for the implementation of the Export Control Law (adopted by Decree 72/3.04.2007).	Implementation completed.	Ministerial Decree – November 2009.	Implementation completed.
Cyprus	A new basic law for the control of exports and imports has already been submitted to the Parliament for approval. Regulations, by which Common Position 2008/944/CFSP and Common Position 2003/468/CFSP will be implemented, will be issued by virtue of this law. Afterwards, these regulations will be submitted to the Council of Ministers of the Republic of Cyprus for approval.			
Czech Republic	Amendment to Act No. 38/1994 on foreign trade in military material, amended by Act No. 357/2004 to make clear reference to brokering activities and by Act No. 220/2009.	Implementation completed.	Amendment to Act No. 38/1994 on foreign trade in military material amended by Act No. 220/2009 reflects certain provisions of the Common Position.	Consequent implementation within directive 2009/43/EC. New National ML listing 22 items in conformity with the EU ML will be included.

Article 12

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25.6.2003, p. 79)		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13.12.2008, p. 99)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Denmark	Act No. 555 of 24 June 2005 on brokering, incorporated in Consolidated Weapons and Explosives Act No. 704/2009.	Implementation completed.	Consolidated Act No. 704 of 22 June 2009 on Weapons and Explosives.	Implementation completed. (In Denmark national law will not have to be changed after the adoption of the Common Position. The criteria of the Common Position are taken into account as a minimum standard in the assessment of licence applications).
Estonia	Strategic Goods Act RT I 2004, 2,7 amended by RT I 2004 53, 366.	Implementation completed.	Strategic Goods Act RT I 2004, 2,7 amended by RT I 2004 53, 366.	References to criteria 6 and 8 of Common Position 2008/944 need to be updated in the present legislation. This work is currently in process. By the completion of amending the law, controls based on criteria 6 and 8 can still be executed and denial issued under the reference of § 16.2.10 of Strategic Goods Act: 'other significant reasons exist'.
Finland	Decision of Council of State on General Guidelines for Export, Transit and Brokering of Defence Material (1000/2002).	Fully implements the Common Position on Brokering.	The former EU CoC is already incorporated into the Finnish legislation as an annex to the National Guidelines (1000/2002).	Changes will be made as one part of the ongoing work on revising the legislation on export of defence equipment.
France	Decree 2002-23.	Amendment to fully implement Common Position in preparation.		

Article 12

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25.6.2003, p. 79)		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13.12.2008, p. 99)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Germany	<p>Legislation on brokering of war weapons adopted in 1978.</p> <p>Amendment to fully implement the Common Position on brokering (2003/468/GASP) is in force since the end of July 2006. This means that not only the brokering of war weapons, but of all items of the EU Common Military list is controlled.</p>	Implementation completed.	In Germany national law will not have to be changed after the adoption of the Common Position. The existing legal requirements in connection with the 'Political Principles Adopted by the Government of the Federal Republic of Germany for the Export of War Weapons and Other Military Equipment' make it possible to immediately apply the regulations laid down in the Common Position.	Implementation completed.
Greece		Amendment of Law 2168/1993 to implement Common Position in preparation.		
Hungary	Gov. decree. 16/2004 on the licensing of the export, import, transfer and transit of Military equipment and technical assistance.	Implementation completed.	The Code of Conduct on arms export has been incorporated into Government Decree 16/2004 on arms exports since May 1, 2004.	Implementation is completed. Council Common Position 2008/944/CFSP is represented in Government Decree 16/2004 on arms exports and is effective since December 1, 2009.
Ireland	Control of Exports Act 2008 (No. 1 of 2008).			Consultations being initiated with Attorney General on eventual need for implementing legislation.
Italy		New draft law for all the sector is in preparation and will include also the Common Position.		New draft law for all the sector is in preparation and will include also the Common Position.
Latvia	Law on the Circulation of Strategic Goods (in force since 19 July 2007).	Implementation completed.	Law on the Circulation of Strategic Goods (in force since 19 July 2007).	<p>Implementation to be completed soon.</p> <p>Regulation on implementation to be passed by the Government in due course.</p>

Article 12

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25 May 2003, pages 79-80).		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13 December 2008, pages 99-103)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Lithuania	Law on the Control of Strategic Goods which came into effect on 1 August 2004, amended 6 April 2006 (effective from 1 July 2006).	Implementation completed.	Law on the Control of Strategic Goods which came into effect on 1 August 2004, amended 6 April 2006 (effective as of 1 July 2006).	Pending amendment of the Law on the Control of Strategic Goods: references to EU Code of Conduct have to be replaced with references to Common Position
Luxembourg		Amendment to implement Common Position in preparation.		
Malta	Subsidiary legislation 365.13. Military equipment export control regulations.	Implementation completed.	Legal Notice 168/2006.	Implementation completed.
Netherlands	Decree on Financial Involvement concerning Strategic Goods Order of 1996, as amended in 1999 and 2001; 1997 Arms and Ammunitions Act.	Implementation completed.	In the Netherlands national law will not have to be changed after the adoption of the Common Position. The legal basis for the application of the regulations laid down in the Common Position consists of several existing Acts, Decrees, Decisions and Regulations.	Implementation completed.
Portugal	Law no. 49/2009 of 5 August 2009.	Implementation completed.		New Law under preparation. It will be in line with the Council Common Position 2008/944/CFSP and include provisions on intra-community transfers, in compliance with the Directive on intra-community transfers.

Article 12

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25 May 2003, pages 79-80).		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13 December 2008, pages 99-103)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Poland	Law of 29/11/2000 on foreign trade in goods, technologies and services of strategic importance to the security of the state and to maintaining international peace and security (uniform text - Journal of Laws of 2004, No 229, item 2315) ²² .	Implementation completed.		Amendment of Law of 29/11/2000 that covers both - trade in arms and in dual-use goods is planned to be completed by the end of 2010 so that it also duly reflects and complies with the provisions of Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items and Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community.
Romania	Law no. 595/2004 and Order no. 59/2005.	Implementation completed.		
Slovakia	Law no. 179/1998 on trading in Military material, as amended.	Implementation completed.		In preparation within the ongoing process of legislation revision together with Directive 2009/43/EC.

²²

Poland first adopted legislation covering brokering activities in the Act of 11 December 1997 on administrating of foreign trade in goods and services and transfers of special goods (Journal of Laws 1997, No. 157, item 1026).

Article 12

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25 May 2003, pages 79-80).		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13 December 2008, pages 99-103)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Slovenia	Decree on permits and consents for trade and production of military weapons and equipment (Official Gazette 18/03, 31/05, 113/07). Brokers are bound to obtain trading permit.	Implementation completed.	Article 77 of the Defence Act (Official Gazette 103/04) specifies that an export license may be refused on the basis of Slovenia's international commitments and obligations.	Amendments to the legislation concerning Defence exports and inclusion of provisions on Intra-Community Transfers, in line with the Directive on Intra-Community Transfers, are in preparation.
Spain	Royal Decree 2061/08 of 12/12/2008 Law 53/2007 of 28/12/2007.	Implementation completed.	Law 53/2007 of 28/12/2007.	A new Royal Decree will be in force in 2010, incorporating Common Position 2008/944/CFSP.
Sweden	Military equipment act 1992:1300 as last amended by 2008:885.	Implementation completed.	Budget letter for the licensing authority, No. UD2009/83256/PLAN the Ordinance with instructions for the licensing authority, No 2007:1219.	Possible measures will be reviewed in connection with an analysis of the implementation requirements of the Directive 2009/43/EC on Intra-Community Transfers.
United Kingdom	Trade in controlled goods order effective 1 May 2004.	Implementation completed.	All export licence applications are required by statute to be assessed against the Consolidated EU and National Arms Export Licensing Criteria which reflects the Common Position.	The UK is working to bring the Consolidated EU and National Arms Export Licensing Criteria fully in line with the Common Position, this should be completed early 2011.

Article 13, 14, 15, 16

Article 13

The User's Guide to the European Code of Conduct on Exports of Military Equipment, which is regularly reviewed, shall serve as guidance for the implementation of this Common Position.

Article 14

This Common Position shall take effect on the date of its adoption.

Article 15

This Common Position shall be reviewed three years after its adoption.

Article 16

This Common Position shall be published in the *Official Journal of the European Union*.

Done at Brussels, 8 December 2008.

For the Council

The President

B. KOUCHNER

Part II: The European Union regime of acquisition and possession of weapons

Introductory Remark: EU regime of acquisition and possession of weapons is regulated by Directive 91/477/EEC as amended by Directive 2008/51/EC.

In order to facilitate understanding we have represented a consolidated version of aforesaid Directives as follows:

- Directive 91/477/EEC (in black in the present text),
- Directive 2008/51/EC (in grey in the present text).

Introductory remarks

Introductory Remark:

Main objectives and principles of Directive 91/477/EEC:

Main objective of this Directive is to abolish controls on the possession of firearms at internal Community borders and partially to harmonise national laws on such firearms.

The abolition of controls at internal Community borders on January 1st, 1993 has *de facto* constrained the EU to adopt the rules in order to accomplish controls on arms circulation within the Member States. Moreover, it was essential to confine the absence of borders, thereby avoiding an incentive to buy arms in countries with less strict legislation. This Directive balances the necessity to control the movement of weapons and the principle of single market. It introduces the rules on acquisition and possession of firearms and organises transfers of firearms between Member States.

Procedure established by this Directive focuses on following subjects:

- A requirement of licence for transfers of firearms between Member States;
- A requirement of authorisation for the cross-border movement of persons travelling in possession of a firearm. Nevertheless, more flexible rules were introduced as regards hunting and sport target shooting.

It should be noted that Directive 91/477/EEC constitutes a standard of harmonisation; consequently Member States are free to adopt more restrictive provisions, on the assumption of their respect of the rules of the Treaty, particularly the principles of proportionality and subsidiarity.

Following issues are excluded of the scope of application of this Directive (Article 2):

- Commercial transfers of weapons of war and ammunition;
- Acquisition and possession of weapons and ammunition by the armed forces, the police, the public authorities, as well as collectors and cultural and historical organisations;
- Carrying of weapons, hunting or sport target shooting activities;
- Acquisition or possession of weapons and ammunition by collectors and bodies concerned with the cultural and historical aspects of weapons and recognised as such by the Member State in which they are established;
- Operations which do not take place within the EU borders.

Main objectives and principles of Directive 2008/51/EC:

Amendments introduced by Directive 2008/51/EC were substantially due to the accession of the EU to the UN Protocol on the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition (see comment relative to Recital 2 of this Directive).

However, it should be kept in mind that this Directive concerns transfers and commerce of firearms undertaken *exclusively within the European Community borders*, whereas the Protocol affects much larger scope of countries.

Those amendments shall fulfil several objectives:

- Harmonisation of the European legislation;
- Fighting the illegal market of weapons initially intended for civilian use;
- Averting penetration of legal weapons in illegal market;
- Definition, within the scope of application of the Directive, of the notions of 'illicit

Introductory remarks

- manufacturing and trafficking of firearms';
- Provisions related to the marking of weapons;
- Extension of the period for register keeping prescribed by Directive 91/477/EEC;
- Clarification of applicable penalties;
- Inclusion of general principles on deactivation of weapons defined by the Protocol.

Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons

Official Journal L 256, 13/09/1991 P.0051–0058

Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons

Official Journal L 179, 8/07/2008, P. 0005–0011

Comment: In order to get more information on the grounds and purposes of Directive 2008/51/EC following documents can be consulted:

- European Parliament debate on control of the acquisition and possession of weapons of 28 November 2007²³.
- Proposal for a Directive amending Council Directive 91/477/EEC²⁴.

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Complementary information: Due to the fact that the Directive is dated the 18 June 1991, it should be emphasised that the term “Treaty” refers to the Single European Act (Luxembourg, 17 February 1986, and The Hague, 28 February 1986).

“Article 100a

*1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a **qualified majority** on a **proposal from the Commission in co-operation with the European Parliament** and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

(...)

*4. If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a **Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36**, or relating to protection of the environment or the working environment, **it shall notify the Commission** of these provisions.*

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States. By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

5. The harmonization measures referred to above shall, in appropriate cases, include a safeguard clause authorizing the Member States to take, for one or more of the non-economic

²³ This debate is available at the following website:

<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20071128&secondRef=ITEM-021&language=EN&ring=A6-2007-0276>.

²⁴ This proposal is available at the following website: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=EN&type_doc=COMfinal&an_d oc=2006&nu_doc=0093.

reasons referred to in Article 36, provisional measures subject to a Community control procedure.”

Including several modifications, present Article has become Article 114 TFEU.

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas Article 8a of the Treaty provides that the internal market must be established by not later than 31 December 1992; whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured, in accordance with the provisions of the Treaty;

Complementary information:

“Article 8a

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 8b, 8c, 28, 57 (2), 59, 70 (1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.”

Including several modifications, present Article is mentioned as Article 14 EC which became Article 26 TFEU with the Treaty of Lisbon.

Whereas, at its meeting in Fontainebleau on 25 and 26 June 1984, the European Council expressly set the objective of abolishing all police and customs formalities at intra-Community frontiers;

Whereas the total abolition of controls and formalities at intra-Community frontiers entails the fulfilment of certain fundamental conditions; whereas in its white paper 'Completing the internal market' the Commission stated that the abolition of controls on the safety of objects transported and on persons entails, among other things, the approximation of weapons legislation;

Complementary information: White Paper from the Commission to the European Council regarding the completion of the internal market²⁵

Taking into account a lack of progress in the cooperation within the EU, a more effective approach appeared to be necessary. Therefore, in its White Paper, approved on 28-29 June 1985 by the European Council in Milan, the Commission has shaped a program for implementation of the internal market.

In order to complete the establishment of the internal market, the White Paper suggested several legislative measures which aim at:

- the elimination of physical frontiers, by abolishing checks on goods and persons at internal frontiers,

²⁵

White paper “Completing the internal market” is available at the following website:
http://www.ena.lu/white_paper_completion_internal_market_14_june_1985-020003520.html.

Preamble

- the elimination of technical frontiers: breaking down the barriers of national regulations on products and services, by harmonisation or mutual recognition,
- the elimination of tax frontiers: overcoming the obstacles created by the differences in indirect taxes, by harmonisation or approximation of VAT rates and excise duty.

The Part One of the White Paper is dedicated to the removal of physical barriers present in national arms-related legislations. Section III thereof “Control of Individuals” includes **point 55** which expresses a wish of the Commission to “*arrive at the stage whereby checks on the entry are also abolished for Community citizens arriving from another Community country*”. For this purpose the Commission had to table a proposal to balance the necessity to control the movement of weapons and the principle of single market. In other words, it was essential to confine the absence of borders, hence avoiding an incentive to buy arms in the countries with less strict legislation. According to the White Paper such proposal had to be drafted in 1985 with target approval in 1988 at the latest.

Whereas abolition of controls on the possession of weapons at intra-Community frontiers necessitates the adoption of effective rules enabling controls to be carried out within Member States on the acquisition and possession of firearms and on their transfer to another Member State; whereas systematic controls must therefore be abolished at intra-Community frontiers;

Whereas the mutual confidence in the field of the protection of the safety of persons which these rules will generate between Member States will be the greater if they are underpinned by partially harmonized legislation; whereas it would therefore be useful to determine category of firearms whose acquisition and possession by private persons are to be prohibited, or subject to authorization, or subject to declaration;

Whereas passing from one Member State to another while in possession of a weapon should, in principle, be prohibited; whereas a derogation therefrom is acceptable only if a procedure is adopted that enables Member States to be notified that a firearm is to be brought into their territory;

Whereas, however, more flexible rules should be adopted in respect of hunting and target shooting in order to avoid impeding the free movement of persons more than is necessary; Whereas the Directive does not affect the right of Member States to take measures to prevent illegal trade in weapons,

Whereas:

(1) Directive 91/477/EEC established an accompanying measure for the internal market. It creates a balance between on the one hand the undertaking to ensure a certain freedom of movement for some firearms within the Community, and on the other the need to control this freedom using security guarantees suited to this type of product.

(2) In accordance with Council Decision 2001/748/EC of 16 October 2001 concerning the signing on behalf of the European Community of the United Nations Protocol on the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition, annexed to the Convention against transnational organised crime, the Commission signed that Protocol (hereinafter referred to as the Protocol) on behalf of the Community on 16 January 2002.

Complementary Information: United Nations Protocol on the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition, annexed to the Convention against transnational organized crime²⁶.

The Protocol was adopted by the UN Resolution 55/255 and it entered into force on 3 June 2005. It reflects the necessity for all States to take appropriate measures in order to prevent, combat and eradicate the illicit manufacturing and trafficking of firearms, their parts and components and ammunition, owing to the harmful effects of those activities on the security of the world as a whole.

It applies to the prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition as well as to the investigation and prosecution of established offences. It shall not apply to State-to-State transactions or to State transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the UN Charter.

According to Council Decision 2001/748/EC²⁷, the Protocol was signed by the Commission on behalf of the Community on 16 January 2002.

(3) The accession of the Community to the Protocol requires amendments to certain provisions of Directive 91/477/EEC. Indeed, it is important to ensure the coherent, effective and rapid application of the international commitments affecting that Directive. Furthermore, it is necessary to take the opportunity of this revision in order to improve that Directive by addressing certain issues, in particular those that were identified in the report of the Commission to the European Parliament and the Council of 15 December 2000 on the implementation of Directive 91/477/EEC.

(4) Police intelligence evidence shows an increase in the use of converted weapons within the Community. It is therefore essential to ensure that such convertible weapons are brought within the definition of a firearm for the purposes of Directive 91/477/EEC.

Comment: The relevance of control of **converted weapons** shall be emphasised. Taking into account their particularly dangerous nature, Article 1(1) of this Directive integrates converted weapons in notion of “firearms”. In addition, in order to avoid legal uncertainty, paragraph 2 of Article 1(1) specifies that *object capable of being converted to expel a shot, bullet or projectile* shall satisfy following conditions:

- it has the appearance of a firearm, and
 - as a result of its construction or the material from which it is made, it can be so converted.
- It should be also noted that Annex I of this Directive covers the ‘firearms disguised as other objects’ and classifies them in Category A-Prohibited firearms.

(5) Firearms, their parts and ammunition, when imported from third countries, are subject to Community legislation and, accordingly, to the requirements of Directive 91/477/EEC.

²⁶ The full text of the Protocol is available at the following website:
http://www.unodc.org/pdf/crime/a_res_55/255e.pdf.

²⁷ OJ L 280, 24.10.2001, p. 5.

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Comment: It must be emphasised that the Directive applies **only** to the **imports** of firearms, their parts and ammunition. The exports of firearms are subject to Council Common Position 2008/944/CFSP as well as to Council Common Position 2003/468/CFSP.

(6) The notions of illicit manufacturing and trafficking of firearms, their parts and ammunition, as well as the notion of tracing, should therefore be defined for the purposes of Directive 91/477/EEC.

(7) Furthermore, the Protocol establishes an obligation to mark weapons at the time of manufacture and at the time of transfer from government stocks to permanent civilian use, whereas Directive 91/477/EEC refers only indirectly to the marking obligation. In order to facilitate the tracing of weapons, it is necessary to use alphanumeric codes and to include in the marking the year of manufacture of the weapon (if not part of the serial number). The Convention of 1 July 1969 on Reciprocal Recognition of Proofmarks on Small Arms should, to the greatest extent possible, be used as a reference for the marking system in the Community as a whole.

(8) Moreover, while the Protocol provides that the period during which registers containing information on weapons are to be kept must be increased to at least 10 years, it is necessary, in view of the dangerous nature and durability of weapons, to extend this period up to a minimum of 20 years in order to allow the proper tracing of firearms. It is also necessary that Member States keep a computerised data-filing system, either a centralised system or a decentralised system which guarantees access to authorised authorities to the data-filing systems in which the necessary information regarding each firearm is recorded. Access by police, judicial and other authorised authorities to the information contained in the computerised data-filing system must be subject to compliance with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(9) In addition, the brokering activities referred to in Article 15 of the Protocol should be defined for the purposes of Directive 91/477/EEC.

(10) In some serious cases, compliance with Articles 5 and 6 of the Protocol requires the application of criminal sanctions and the confiscation of the weapons.

(11) With regard to the deactivation of firearms, point (a) of Part III of Annex I to Directive 91/477/EEC simply refers to national legislation. The Protocol sets out more explicit general principles for the deactivation of weapons. Annex I to Directive 91/477/EEC should therefore be amended.

(12) Due to the special nature of the activity of dealers, it is necessary that Member States exercise a strict control over this activity, in particular by verifying the professional integrity and abilities of dealers.

(13) The acquisition of firearms by private individuals by means of distance communications, for example via the Internet should, where authorised, be subject to the rules laid down in Directive 91/477/EEC and, as a general rule, the acquisition of firearms by persons convicted by a final court judgment of certain serious criminal offences should be prohibited.

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Comment: Initially this provision proposed, **except with respect to dealers and brokers**, a **prohibition of acquisition** of firearms through the means of distance communication, which do not allow appropriate control. Another suggested measure required an introduction of a **cooling-off period** between the moment when the client orders the firearm and that when the firearm is delivered, initially set up to 15 days. Such period, already put in practice in State of California, could decrease the crimes under temporary state of mental disorder. Present Recital 13 as well as amended Article 6 did not keep either a cooling-off period, or complete prohibition of the acquisition of firearms through the means of distance communication, albeit admitting that, where authorised, it should be strictly controlled. Therefore, this Directive does not provide any explicit rule on acquisition by means of distance communication (see also comment on Article 6).

(14) The European firearms pass functions in a satisfactory way on the whole and should be regarded as the main document needed by hunters and marksmen for the possession of a firearm during a journey to another Member State. Member States should not make the acceptance of the European firearms pass conditional upon the payment of any fee or charge.

Comment: This provision was added by the European Parliament that considered the European firearms pass (hereinafter referred to as EFP) to be the **sole** document required from hunters and marksmen. Such approach was also backed up by the majority of Member States. However, this statement was not implemented in this Directive (see also comment on Article 12(2)).

(15) In order to facilitate the tracing of firearms and efficiently to combat the illicit trafficking and manufacturing of firearms, their parts and ammunition, it is necessary to improve the exchange of information between Member States.

(16) The processing of information is subject to compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [5] and does not prejudice the level of protection of individuals with regard to the processing of personal data under Community and national law, and in particular does not alter the obligations and rights set out in Directive 95/46/EC.

(17) The measures necessary for the implementation of Directive 91/477/EEC should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [6].

(18) Several Member States have simplified the way they classify firearms by switching from four categories to the following two: prohibited firearms and firearms subject to authorisation. Member States should fall into line with this simplified classification, although Member States which divide firearms into a further set of categories may, in accordance with the principle of subsidiarity, maintain their existing classification systems.

(19) Authorisations for the acquisition and possession of firearms should, as far as possible, involve a single administrative procedure.

(20) Article 2(2) of Directive 91/477/EEC among other things excludes from the scope of application of that Directive the acquisition or possession of weapons and ammunition in

Preamble

accordance with national law by collectors and bodies concerned with the cultural and historical aspects of weapons and recognised as such by the Member State in whose territory they are established.

(21) In accordance with point 34 of the Interinstitutional Agreement on better law-making [7], Member States should draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and make them public.

(22) Directive 91/477/EEC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER 1 Scope

Article 1

1. For the purposes of this Directive, "firearm" shall mean any portable barrelled weapon that expels, is designed to expel or may be converted to expel a shot, bullet or projectile by the action of a combustible propellant, unless it is excluded for one of the reasons listed in Part III of Annex I. Firearms are classified in Part II of Annex I.

Comment:

The Protocol also contains a definition of firearms, according to **Article 3(a)** thereof "*firearm shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899*".

Therefore, a definition of firearms, as amended by Directive 2008/51/EC, aligns the EU legislation with provisions of the Protocol. Nevertheless, this definition excludes deactivated firearms; firearms designed for alarm, signalling, life-saving, animal slaughter or harpoon fishing or for industrial or technical purposes; and antique weapons, as it is mentioned in Part III of Annex I of this Directive.

In general, Part II of Annex I of this Directive distinguishes four categories of firearms:

- *Category A* – prohibited firearms,
- *Category B* – firearms subject to authorisation,
- *Category C* – firearms subject to declaration,
- *Category D* – other firearms.

Besides, some European deputies wanted to abolish the four-category differentiation of firearms, arguing that several Member States (i.e. Ireland) introduced merely two categories into their national legislations, such as forbidden firearms and firearms subject to authorisation.

Nevertheless, according to Recital 18 of this Directive which is worded as follows:

"Several Member States have simplified the way they classify firearms by switching from four categories to the following two: prohibited firearms and firearms subject to authorisation. Member States should fall into line with this simplified classification, although Member States which divide firearms into a further set of categories may, in accordance with the principle of subsidiarity, maintain their existing classification systems".

Member States are free to decide which classification to adopt. This provision is due to the respect of special features and traditions of Member States that stems from the principle of subsidiarity inherent in the European Union policies.

It shall be noted that categories defined in Part II of Annex I of this Directive, notably the categories B, C and D could be included in the concept of '*small arms and light weapons*' as defined by the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons²⁸, adopted by the UN General Assembly on December 8th, 2005.

According to this document, '*small arms and light weapons*' mean "*any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted*

²⁸

The full text of International Instrument is available on the following website:

<http://www.poa-iss.org/InternationalTracing/InternationalTracing.aspx>.

to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas. []

‘Small arms’ are, broadly speaking, weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns.

‘Light weapons’ are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, inter alia, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a caliber of less than 100 millimetres.”

For the purposes of this Directive, an object shall be considered as capable of being converted to expel a shot, bullet or projectile by the action of a combustible propellant if:

- it has the appearance of a firearm, and
- as a result of its construction or the material from which it is made, it can be so converted.

1a. For the purposes of this Directive, "part" shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm.

1b. For the purposes of this Directive, "essential component" shall mean the breach-closing mechanism, the chamber and the barrel of a firearm which, being separate objects, are included in the category of the firearms on which they are or are intended to be mounted.

Comment: Article 3(b) of the Protocol provides a common definition of “**parts and components**”. In order to preserve legal certainty aforesaid definition was used by this Directive to clarify the sole term “**part**”.

1c. For the purposes of this Directive, "ammunition" shall mean the complete round or the components thereof, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorisation in the relevant Member State.

Comment: In order to preserve legal certainty the definition of term “ammunition**” reproduces that used by **Article 3(c) of the Protocol**.**

1d. For the purposes of this Directive, "tracing" shall mean the systematic tracking of firearms and, where possible, their parts and ammunition from manufacturer to purchaser for the purpose of assisting the competent authorities of Member States in detecting, investigating and analysing illicit manufacturing and illicit trafficking.

Comment: In order to preserve legal certainty this provision uses the definition of “tracing**” provided by **Article 3(f) of the Protocol**. Besides, the notion of tracing of firearms, their parts and components is essential in a combat against illicit trafficking and manufacturing.**

1e. For the purposes of this Directive, "broker" shall mean any natural or legal person, other than a dealer, whose trade or business consists wholly or partly in the buying, selling or arranging the transfer of weapons.

Comment: The term “**weapons**” used in this provision deserves to be pointed out. The scope thereof is far too general; therefore it is difficult to understand which items shall be taken into account (i.e. firearms, ammunitions, parts). Nevertheless, this notion is specified in Annex I of this Directive:

“I. For the purposes of this Directive, 'weapon' means:

- any firearm as defined in Article 1 of the Directive,*
- weapons other than firearms as defined in national legislation”.*

It shall be noted that the transactions involving ammunitions and parts of firearms are excluded from the definition of brokering activities.

As concerns the definition of “**dealer**”, the items concerned, namely firearms, parts and ammunition, are clearly mentioned by Article 1(2).

The difference between “dealer” and “broker” stands essentially in fact that broker usually does not own nor get in touch with the goods he deals in. However, abovementioned difference is rather an empirical one and therefore it has no legal force with regard to the application of this Directive.

2. For the purposes of this Directive, "dealer" shall mean any natural or legal person whose trade or business consists wholly or partly in the manufacture, trade, exchange, hiring out, repair or conversion of firearms, parts and ammunition.

Comment: An addition of the reference to “**parts and ammunition**” results from accession of the EU to the Protocol. Such amendment was required for the purpose of enlargement of the scope of application of Directive to the control of parts of firearms and ammunition, which are defined respectively in the Articles 1b and 1c of this Directive.

2a. For the purposes of this Directive, "illicit manufacturing" shall mean the manufacturing or assembly of firearms, their parts and ammunition:

- (i) from any essential component of such firearms illicitly trafficked;
- (ii) without an authorisation issued in accordance with Article 4 by a competent authority of the Member State where the manufacture or assembly takes place; or
- (iii) without marking the assembled firearms at the time of manufacture in accordance with Article 4(1).

2b. For the purposes of this Directive, "illicit trafficking" shall mean the acquisition, sale, delivery, movement or transfer of firearms, their parts or ammunition from or across the territory of one Member State to that of another Member State if any one of the Member States concerned does not authorise it in accordance with the terms of this Directive or if the assembled firearms are not marked in accordance with Article 4(1).

Comment: Article 3(d) of the Protocol provides identical definition of “**illicit trafficking**”; however it also includes transactions concerning import and export. It should be kept in mind, that the scope of this Directive only covers activities related to the internal market. Therefore the notions of import, export and transfer used by the Protocol are restricted to transactions undertaken within the EU while leaving aside those involving third countries.

3. For the purposes of this Directive, a person shall be deemed to be a resident of the country indicated by the address appearing on a document establishing his place of residence, such as a passport or an identity card, which, on a check on possession or on acquisition, is submitted to the authorities of a Member State or to a dealer.

4. A "European firearms pass" shall be issued on request by the authorities of a Member State to a person lawfully entering into possession of and using a firearm. It shall be valid for a maximum period of five years, which may be extended, and shall contain the information set out in Annex II. It shall be non-transferable and shall record the firearm or firearms possessed and used by the holder of the pass. It must always be in the possession of the person using the firearm and any change in the possession or characteristics of the firearm, as well as the loss or theft thereof, shall be indicated on the pass.

Comment: Former Article 1(4) established a variable validity for European firearm pass according to the category of arms it made reference to. Whereas a common period of validity of pass was set up to a maximum of five years, the derogation stipulated “*where only firearms classified in category D appear on the pass, the maximum period of validity thereof shall be ten years*”.

The standard of the EFP was established by the Commission in Recommendation 93/216/EEC of 25 February 1993, modified by Recommendation 96/129/EEC²⁹ of 12 January 1996. All Member States have decided to adopt the model of the pass elaborated by the Commission.

²⁹

The Recommendation is available at the following website:

http://ec.europa.eu/enterprise/regulation/goods/docs/dir91477/recomcart_en.pdf

Article 2

1. This Directive is without prejudice to the application of national provisions concerning the carrying of weapons, hunting or target shooting.

Comment: In other words this Directive completes national legislations and does not intend to replace them.

It should be noted that the main aim of this Directive is to harmonise the rules on acquisition and possession of firearms in the EU. In order to have a complete overview of this issue, national legislations of Member States should be examined.

2. This Directive shall not apply to the acquisition or possession of weapons and ammunition, in accordance with national law, by the armed forces, the police, the public authorities or by collectors and bodies concerned with the cultural and historical aspects of weapons and recognized as such by the Member State in whose territory they are established. Nor shall it apply to commercial transfers of weapons and ammunition of war.

Comment: As regards collectors and cultural and historical organisations, there is a necessity to underline an ambiguity of the term “**antique weapons**”.

The Commission has proposed to use the provisions of the Schengen acquis, namely Article 82 that gives criteria to recognise an antique weapon based on the date of fabrication.

Therefore, all weapons fabricated prior to January 1st, 1870 shall be considered as antiques weapons.

Nevertheless, this Article reserves the possibility for Member States to introduce exceptions at the national level. Several Member States has exercised this right, thereby introducing different interpretations in this area. The need of legal certainty constrained the European Parliament to propose several amendments in order to close this loophole by opting for the adoption of the definition of Article 82 of Schengen acquis. However this definition was revised defining “**antique weapon**” as “*either any weapon manufactured before 1900, including replicas, or any newer weapon defined as an antique weapon by a Member State according to technical criteria*”.

None of those provisions was included in the draft of Directive 2008/51/EC.

Member State	Antique weapon specification
Belgium	Model of firearm shall be anterior to 1890 and it shall be manufactured before 1945
Denmark	Firearms manufactured before 1870
Ireland	Weapons manufactured before 1845 which have an ignition system that does not utilise cased ammunition
Italy	Firearms manufactured before 1890
Lithuania	An arm made before the year 1870
Poland	An arm made before the year 1870
Slovakia	A model developed before December 31, 1890
United Kingdom	Firearms manufactured before 1st January 1 st , 1919

Article 3

Member States may adopt in their legislation provisions which are more stringent than those provided for in this Directive, subject to the rights conferred on residents of the Member States by Article 12 (2).

Comment: This Directive essentially establishes the common elements to be implemented by Member States. Its main objective remains to harmonise national legislations governing the field of acquisition and possession of firearms within the EU borders even if Member States are free to adopt more restrictive provisions.

CHAPTER 2 Harmonization of legislation concerning firearms

Article 4

1. Member States shall ensure either that any firearm or part placed on the market has been marked and registered in compliance with this Directive, or that it has been deactivated.
2. For the purpose of identifying and tracing each assembled firearm, Member States shall, at the time of manufacture of each firearm, either:
 - (a) require a unique marking, including the name of the manufacturer, the country or place of manufacture, the serial number and the year of manufacture (if not part of the serial number). This shall be without prejudice to the affixing of the manufacturer's trademark. For these purposes, the Member States may choose to apply the provisions of the Convention of 1 July 1969 on Reciprocal Recognition of Proofmarks on Small Arms; or

Complementary information: Convention for the reciprocal recognition of proof marks on small arms, signed at Brussels on 1 July 1969³⁰:

This Convention establishes the Permanent International Commission for the Proving of Small Arms, which is composed of representatives of all Contracting Parties. Each Contracting Party has one vote, whatever the number of its representatives. Following Member States have signed the Convention: Austria, Belgium, Czech Republic, Finland, France, Germany, Hungary, Italy, Slovak Republic, Spain and United Kingdom.

Article I sets up following functions for of Permanent International Commission:

“(1) To select apparatus to serve as a standard for shooting pressure measurements, and measuring procedures to be employed by the official services for accurate and practical determination of pressures developed by standard and proof cartridges, in respect of:
(a) sporting, target and defensive arms, with the exception of arms for land, sea and air warfare; however, the Contracting Parties shall be entitled to use, for any or all of the latter arms, the measuring instruments and procedures adopted hereunder;
(b) all other portable devices, arms or apparatus for industrial or occupational use not covered above which utilize an explosive charge to propel a projectile or mechanical parts of any kind, and the testing of which is deemed necessary by the Permanent International Commission.

Such apparatus shall be termed "standard apparatus".

(2) To determine the nature and manner of execution of the official tests to which the arms or apparatus specified in paragraph (1) (a) and (b) will be subjected, with a view to providing every guarantee of safety.

Such tests shall be termed "standard tests".

(3) To incorporate into the standard measurement apparatus and the operating procedures, as also into the standard tests, such improvements, modifications or additions as may be called for by advances in metrology or in the production of small arms and apparatus for industrial and occupational use and of ammunition therefor.

(4) To promote the standardization of chamber dimensions of commercial fire-arms and the methods of inspection and testing of ammunition there for.

(5) To examine the laws and regulations concerning the official testing of small arms enacted by the Contracting Governments with a view to ascertaining whether they are in conformity with the determinations made under paragraph (2) above.

³⁰

This Convention is available at the following website:

http://untreaty.un.org/unts/1_60000/23/3/00044110.pdf.

(6) To declare in which Contracting States the tests performed correspond to the standard tests under paragraph (2) and to issue a table of facsimiles of the proof marks employed by those States' official proof houses both currently and in the time since the signing of the Convention of 15 July 1914.

(7) To withdraw the declaration provided for in paragraph (6) above and amend the said table should the conditions referred to in paragraph (6) cease to be fulfilled.”

Article II stipulates that the proof marks of the official proof houses of each of the Contracting Parties shall be recognised in the territory of the other Contracting Parties provided prior declaration of the CIP.

Decisions of the Permanent International Commission are taken by vote, provided that the number of votes constitutes at least two thirds of the total number of members of the Permanent International Commission. However, when the question of recognising of proof marks of a Contracting Party is being considered, the Party concerned shall not be entitled to vote. The decisions shall enter into force if within the six months following the notification accomplished by the Permanent Bureau none of the Contracting Parties submits an objection or reservations.

- (b) maintain any alternative unique user-friendly marking with a number or alphanumeric code, permitting ready identification by all States of the country of manufacture.

Comment: This Directive does not opt for marking with geometric symbols, which is generally used in China and in several States of the former USSR. Therefore, such marking might only be understood by the country of manufacture. Hence, marking with alphabetic symbols was privileged for transfers implying EU Member States.

The marking shall be affixed to an essential component of the firearm, the destruction of which would render the firearm unusable.

Member States shall ensure that each elementary package of complete ammunition is marked so as to provide the name of the manufacturer, the identification batch (lot) number, the calibre and the type of ammunition. For these purposes Member States may choose to apply the provisions of the Convention of 1 July 1969 on Reciprocal Recognition of Proofmarks on Small Arms.

Furthermore, Member States shall ensure, at the time of transfer of a firearm from government stocks to permanent civilian use, the appropriate unique marking permitting identification by States of the transferring country.

3. Member States shall make the pursuit of the activity of dealer within their territory conditional upon authorisation on the basis of at least a check of the private and professional integrity and of the abilities of the dealer. In the case of a legal person, the check shall be on the person who directs the undertaking.

Comment: This provision was amended several times. Initially a difference was made between the categories A and B, and the categories C and D. As concerns the categories A and B, the pursuit of the activity of dealer was submitted to authorisation. As concerns categories C and D, a declaration was required in order to proceed with the activity of dealer. Nevertheless, the European Parliament did not endorse this consideration. Therefore, notwithstanding the category in question, the pursuit of the activity of dealer has to be submitted to authorisation.

It is interesting to point that the European Parliament opted, in addition to verification of professional abilities of dealers and brokers, for an obligation to verify “*the origin of their financial means*”, grounding this requirement by specific nature of their activity as well as by need of proper regulation thereof.

However, the term “check of the private and professional integrity and of the abilities of the dealer” might engender various and not always compatible interpretations. Therefore the implementation of this provision in national legislations deserves to be carefully analysed in order to grasp the meaning given to it by Member States.

It should be noted, that initially this provision concerned also the activity of broker, since the Commission wanted to enclose brokering activities, as mentioned in Article 15 “Brokers and brokering” of the Protocol, within the definition of “dealer” given by this Directive³¹.

Consequently brokering activities had to be regulated similarly as these of dealers.

Nevertheless, this proposal was not endorsed; therefore brokering activities are regulated separately by Article 4b of this Directive.

4. Member States shall, by 31 December 2014, ensure the establishment and maintenance of a computerised data-filing system, either a centralised system or a decentralised system which guarantees to authorised authorities access to the data-filing systems in which each firearm subject to this Directive shall be recorded. This filing system shall record and maintain for not less than 20 years each firearm’s type, make, model, calibre and serial number, as well as the names and addresses of the supplier and the person acquiring or possessing the firearm.

Comment: Article 7 of the Protocol also constrains State Parties with guarantee of maintenance, for not less than 10 years, of information in relation to:

- firearms,
- their parts and components where appropriate and feasible,
- ammunition that is necessary to their tracing and identification.

This Directive appears to be stricter as regards the duration of maintain of information.

Justification of extension of the period of maintenance of information up to 20 years is partially due to the dangerous nature and longevity of weapons. By integrating this provision the Commission believed to decrease a likelihood of the diversion of weapons for criminal intentions as well as to provide the proper tracing of firearms.

Mentioned data-filing system is accessible by the police and judicial authorities responsible for the prevention, investigation, detection and prosecution of criminal offences.

The processing of the information cannot prejudice rights relative to either the protection of individuals granted by Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data³², or the level of protection provided by Community and national law.

Article 12 of the Protocol requires States Parties to exchange relevant case-specific information on for example authorised producers, dealers, importers, exporters and, whenever possible, carriers of firearms, their parts and components and ammunition.

³¹ See 27th Amendment of draft European Parliament legislative resolution on the proposal for a directive amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2007-0276+0+DOC+XML+V0//EN>.

³² OJ L 281, 23.11.1995, p. 31 as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

Throughout their period of activity, dealers shall be required to maintain a register in which all firearms subject to this Directive and which are received or disposed of by them shall be recorded, together with such particulars as enable the firearm to be identified and traced, in particular the type, make, model, calibre and serial number thereof and the names and addresses of the persons supplying and acquiring it. Upon the cessation of his activities, the dealer shall deliver the register to the national authority responsible for the filing system provided for in subparagraph 1.

5. Member States shall ensure that all firearms may be linked to their owner at any moment. However, as regards firearms classified in category D, Member States shall, as from 28 July 2010, put into place appropriate tracing measures, including, as from 31 December 2014, measures enabling linking at any moment to the owner of firearms placed on the market after 28 July 2010.

Comment: It shall be noted that previously Member States were bounded to make the pursuit of the activity of dealer conditional upon:

- an authorisation, at least with respect to categories A and B;
- a declaration with respect of categories C and D.

Presently, Member States are urged to require an authorisation for pursuit of the activity of dealer for all categories of firearms subject to this Directive.

In addition, former provision required each dealer to keep a register with inventory of all firearms classified in categories A, B or C. Period of conservation of such register was set up to 5 years.

Presently, the register is required for all categories of firearms thereby category D is also referred. Moreover, the information recorded shall be maintained for not less than 20 years, which increases considerably the period of preservation of information.

It should be noted, that initially this provision also concerned the activity of broker, since the Commission wanted to enclose brokering activities, as mentioned in Article 15 “Brokers and brokering” of the Protocol, within the definition of dealer given by the Directive³³.

Consequently brokering activities had to be regulated similarly as those of dealers.

Nevertheless, this proposal was not endorsed; therefore brokering activities are regulated separately by Article 4b of this Directive, as amended.

Article 4a

Without prejudice to Article 3, Member States shall allow the acquisition and possession of firearms only by persons who have been granted a licence or, with respect to categories C or D, who are specifically permitted to acquire and possess such firearms in accordance with national law.

Comment: it shall be noted that several Member States have decided to introduce more than two categories regarding licences for acquisition and possession of firearms. Thus Slovakia and Czech Republic established a distinction for firearms permits according to the purpose for which the firearm or ammunition is to be used.

As concerns **Slovakia** following groups were set up:

A – carrying a firearm and ammunition in order to protect a person and property,

B – keeping a firearm and ammunition in order to protect a person and property,
C – keeping a firearm and ammunition in order to carry out one's employment or authorisation according to a special regulation,
D – keeping a firearm and ammunition for hunting purposes,
E – keeping a firearm and ammunition for sports purposes,
F – keeping a firearm and ammunition for museum or collector's purposes.

As concerns **Czech Republic** provided groups are:

A – collectors' purposes,
B – sports purposes,
C – hunting purposes,
D – pursuing a profession or occupation,
E – protecting life, health or property, or
F – activities in the field of unexploded ordnance.

The groups provided by both States are rather similar, however the corresponding categories differ which can eventually result in legal uncertainty.

Article 4b

Member States shall consider establishing a system for the regulation of the activities of brokers. Such a system might include one or more measures such as:

- (a) requiring the registration of brokers operating within their territory;
- (b) requiring the licensing or authorisation of the activity of brokering.;

Comment: It shall be noted that measures stated in points (a) and (b) are those proposed by **Article 15 of the Protocol**, which in addition includes a point (c) worded as follows:
“Requiring disclosure on import and export licenses or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction”.

Article 5

Without prejudice to Article 3, Member States shall permit the acquisition and possession of firearms only by persons who have good cause and who:

- (a) are at least 18 years of age, except in relation to the acquisition, other than through purchase, and possession of firearms for hunting and target shooting, provided that in that case persons of less than 18 years of age have parental permission, or are under parental guidance or the guidance of an adult with a valid firearms or hunting licence, or are within a licensed or otherwise approved training centre;
- (b) are not likely to be a danger to themselves, to public order or to public safety. Having been convicted of a violent intentional crime shall be considered as indicative of such danger.

Comment: This Article strongly bounds acquisition and possession of firearms by minors for hunting and target shooting:

- The exception for minors as concerns firearms for hunting and target shooting was bounded by the requirement of parental permission or specific guidance (Article 5(a)),
- The notion “*be a danger to themselves, to public order or to public safety*” was specified (Article 5(a)).

It should be noted that former wording of this Article concerned only firearms classified in Category B (firearms subject to authorisation). Consequently the rules on acquisitions and possession of firearms classified in Categories C and D has been reinforced.

Member States may withdraw authorisation for possession of a firearm if any of the conditions on the basis of which it was granted are no longer satisfied.

Member States may not prohibit persons resident within their territory from possessing a weapon acquired in another Member State unless they prohibit the acquisition of the same weapon within their own territory.

Article 6

Member States shall take all appropriate steps to prohibit the acquisition and the possession of the firearms and ammunition classified in category A. In special cases, the competent authorities may grant authorizations for such firearms and ammunition where this is not contrary to public security or public order.

Comment: Firearms and ammunitions listed in category A constitute a minimum requirement as concerns the firearms that shall be prohibited. According to Article 8(3) of this Directive, Member States can extend this list by adding other items, which they consider as enough dangerous to be prohibited for individual acquisition and the possession. Therefore, there is no common list of prohibited firearms taking into account that the one proposed by this Directive can be amended by 27 Member States.

Member States shall ensure that, except with respect to dealers, the acquisition of firearms and their parts and ammunition by means of distance communication, as defined in Article 2 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts[], shall, where authorised, be strictly controlled.

Complementary information: Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts³⁴

Bearing in mind that the new technologies are increasing the number of ways for consumers to view bids anywhere in the EU and to place orders, Directive 97/7/EC offers the minimum scope of measures to be taken by Member States in order to protect the consumers with regard to distance contracts.

Article 2 provides the definition of “**means of distance communication**” which are characterised as follows “*any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties*”. Annex I contains an indicative list of means covered by Directive 97/7/EC which includes:

- Unaddressed printed matter,
- Addressed printed matter,
- Standard letter,
- Press advertising with order form,
- Catalogue,
- Telephone with human intervention,
- Telephone without human intervention (automatic calling machine, audiotext),
- Radio,
- Videophone (telephone with screen),
- Videotex (microcomputer and television screen) with keyboard or touch screen,
- Electronic mail,
- Facsimile machine (fax),
- Television (teleshopping).

Article 3 establishes a list of exemptions, notably the cases where Directive 97/7/EC shall not be applied, *inter alia*, cases:

- related to financial services, a non-exhaustive list of which is given in Annex II,
- concluded by means of automatic vending machines or automated commercial premises,
- concluded with telecommunications operators through the use of public payphones,
- concluded for the construction and sale of immovable property or relating to other immovable property rights, except for rental,
- concluded at an auction.

Article 10 introduces a set of restrictions on the use of certain means of distance communication. Thereby, only providing prior consent of the consumer, a supplier can use an automated calling system without human intervention or a facsimile machine. Member States shall ensure that means of distance communication which allow individual communications may be used only where there is no clear objection from the consumer.

Article 7

1. No one may acquire a firearm classified in category B within the territory of a Member State unless that Member State has so authorized him.

No such authorization may be given to a resident of another Member State without the latter's prior agreement.

Article 5, 6, 7

2. No one may be in possession of a firearm classified in category B within the territory of a Member State unless that Member State has so authorized him. If he is a resident of another Member State, that other Member State shall be informed accordingly.

3. An authorization to acquire and an authorization to possess a firearm classified in category B may take the form of a single administrative decision.

4. Member States may consider granting persons who satisfy the conditions for the granting of an authorisation for a firearm a multiannual licence for the acquisition and possession of all firearms subject to authorisation, without prejudice to:

- (a) the obligation to notify the competent authorities of transfers;
- (b) the periodic verification that those persons continue to satisfy the conditions; and
- (c) the maximum limits for possession laid down in national law.

5. Member States shall adopt rules to ensure that persons holding authorisations for firearms of category B in force under national law as at 28 July 2008 do not need to apply for a licence or permit regarding firearms they hold in categories C or D due to the entry into force of Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 []. However, any subsequent transfer of firearms of categories C or D shall be subject to the transferee obtaining or having a licence or being specifically permitted to possess those firearms in accordance with national law.

Article 8

1. No one may be in possession of a firearm classified in category C unless he has declared it to the authorities of the Member State in which that firearm is held.

The Member States shall provide for the compulsory declaration of all firearms classified in category C at present held within their territories but not previously declared within one year of the entry into force of the national provisions transposing this Directive.

2. Every seller, dealer or private person shall inform the authorities of the Member State in which it takes place of every transfer or handing over of a firearm classified in category C, giving the particulars by which the firearm and the person acquiring it may be identified. If the person acquiring such a firearm is a resident of another Member State, that other Member State shall be informed of the acquisition by the Member State in which it took place and by the person acquiring the firearm.

3. If a Member State prohibits or makes subject to authorization the acquisition and possession within its territory of a firearm classified in category B, C or D, it shall so inform the other Member States, which shall expressly include a statement to that effect on any European firearms pass they issue for such a firearm, pursuant to Article 12 (2).

Article 9

1. The handing over of a firearm classified in category A, B or C to a person who is not resident in the Member State in question shall be permitted, subject to compliance with the obligations laid down in Articles 6, 7 and 8:

- where the person acquiring it has been authorized in accordance with Article 11 himself to effect a transfer to his country of residence,
- where the person acquiring it submits a written declaration testifying to and justifying his intention to be in possession of the firearm in the Member State of acquisition, provided that he fulfils the legal conditions for possession in that Member State.

2. Member States may authorize the temporary handing over of firearms in accordance with procedures which they shall lay down.

Article 10

The arrangements for the acquisition and possession of ammunition shall be the same as those for the possession of the firearms for which the ammunition is intended.

CHAPTER 3 Formalities for the movement of weapons within the Community**Article 11**

Authorisation	Content	Reference
Individual Transfer authorisation	Granted to persons undertaking transfers of firearms between Member States. Possible for all categories of firearms listed in Annex I of this Directive. If authorisation is granted, a licence shall accompany the firearm during transportation thereof and shall be produced on request.	Article 11(1)
Plural Transfer Authorisation	Granted to a dealer undertaking transfers of firearms to a dealer established in another Member State. Possible for all categories of firearms listed in Annex I of this Directive. An authorisation is granted for maximum period of three years. It shall accompany the firearm during transportation thereof and shall be produced on request.	Article 11(3)
Individual Travel Authorisation	Granted to persons travelling through two or more Member States. Such authorisation shall appear on the European firearms pass.	Article 12(1), paragraph 1
Plural Travel Authorisation	Granted to persons travelling through two or more Member States. Such authorisation is valid for more than one journey for a maximum period of one year. It shall appear on the European firearms pass.	Article 12(1), paragraph 2
Derogation for Hunters	Exclusively applicable to categories C and D. No authorisation required if: - Journey with a view of engaging in hunting activities; - Possession of a European firearms pass; - Capability to substantiate the reasons for the journey (i.e. invitation, other proof). N.B. Authorisation is required if Member State prohibits/makes subject to authorisation the acquisition and possession of the firearm in question.	Article 12(2), paragraph 1
Derogation for Marksmen	Exclusively applicable to categories B, C and D. No authorisation required if: - Journey with a view of engaging in target shooting activities; - Possession of a European firearms pass; - Capability to substantiate the reasons for the journey (i.e. invitation, other proof). N.B. Authorisation is required if Member State prohibits/makes subject to authorisation the acquisition and possession of the firearm in question.	Article 12(2), paragraph 1

1. Firearms may, without prejudice to Article 12, be transferred from one Member State to another only in accordance with the procedure laid down in the following paragraphs. These provisions shall also apply to transfers of firearms following a mail order sale.

2. Where a firearm is to be transferred to another Member State, the person concerned shall, before it is taken there, supply the following particulars to the Member State in which such firearm is situated:

- the names and addresses of the person selling or disposing of the firearm and of the person purchasing or acquiring it or, where appropriate, of the owner,
- the address to which the firearm is to be consigned or transported,
- the number of firearms to be consigned or transported,
- the particulars enabling the firearm to be identified and also an indication that the firearm has undergone a check in accordance with the Convention of 1 July 1969 on the Reciprocal Recognition of Proofmarks on Small Arms,
- the means of transfer,
- the date of departure and the estimated date of arrival.

The information referred to in the last two indents need not be supplied where the transfer takes place between dealers.

The Member State shall examine the conditions under which the transfer is to be carried out, in particular with regard to security.

Where the Member State authorizes such transfer, it shall issue a licence incorporating all the particulars referred to in the first subparagraph. Such licence shall accompany the firearm until it reaches its destination; it shall be produced whenever so required by the authorities of the Member States.

3. In the case of transfer of the firearms, other than weapons of war, excluded from the scope of this Directive pursuant to Article 2 (2), each Member State may grant dealers the right to effect transfers of firearms from its territory to a dealer established in another Member State without the prior authorization referred to in paragraph 2. To that end it shall issue an authorization valid for no more than three years, which may at any time be suspended or cancelled by reasoned decision. A document referring to that authorization must accompany the firearm until it reaches its destination; it must be produced whenever so required by the authorities of the Member States.

Prior to the date of transfer, the dealer shall communicate to the authorities of the Member State from which the transfer is to be effected all the particulars listed in the first subparagraph of paragraph 2. Those authorities shall carry out inspections, where appropriate on the spot, to verify the correspondence between the information communicated by the dealer and the actual characteristics of the transfer. The information shall be communicated by the dealer within a period allowing sufficient time.

Comment: It shall be noted that during amendment procedure, the European Parliament opted for the delay of 5 days available to a dealer to communicate all necessary information. Nevertheless, this requirement was not endorsed by this Directive.

4. Each Member State shall supply the other Member States with a list of firearms the transfer of which to its territory may not be authorized without its prior consent.

Such lists of firearms shall be communicated to dealers who have obtained approval for transferring firearms without prior authorization under the procedure laid down in paragraph 3.

Comment: This provision introduces derogation to the main principle on this Directive, namely the possibility for Member States to issue an authorisation for export of firearms from their territory.

Indeed, Article 11(4) allows a Member State to establish a list of firearms that shall obtain an authorisation thereof before being transferred to its territory. This is the sole possibility provided by this Directive, which gives to Member States a right to issue a so-called “import authorisation”.

Article 12

1. If the procedure provided for in Article 11 is not employed, the possession of a firearm during a journey through two or more Member States shall not be permitted unless the person concerned has obtained the authorization of each of those Member States.

Member States may grant such authorization for one or more journeys for a maximum period of one year, subject to renewal. Such authorizations shall be entered on the European firearms pass, which the traveller must produce whenever so required by the authorities of the Member States.

2. Notwithstanding paragraph 1, hunters, in respect of categories C and D, and marksmen, in respect of categories B, C and D, may, without prior authorisation, be in possession of one or more firearms during a journey through two or more Member States with a view to engaging in their activities, provided that they are in possession of a European firearms pass listing such firearm or firearms and provided that they are able to substantiate the reasons for their journey, in particular by producing an invitation or other proof of their hunting or target shooting activities in the Member State of destination.

Member States may not make acceptance of a European firearms pass conditional upon the payment of any fee or charge.

Comment: This Directive introduces a facilitation regarding a possession of firearms, but it should be emphasised that this exception is conditional upon several elements such as:

- A profession of the possessor,
- A category of firearm under his possession,
- Activities to undertake,
- A territory of undertaking.

It should be kept in mind that this Directive covers only journeys within the EU. It does not regulate the conditions of firearm holding in the Member State where the possessor is resident.

Besides, amended Article 12(2) enlarges the set of documents to be produced by hunters and marksmen in order to substantiate the reasons for their journey by amplifying that the “*other proof of their hunting or target shooting activities in the Member State of destination*” can be accepted. Whereas, the former provision stipulated that only an invitation had to be produced (see also comment relative to Recital 14).

However, this derogation shall not apply to journeys to a Member State which prohibits the acquisition and possession of the firearm in question or which, pursuant to Article 8 (3), makes it subject to authorization; in that case, an express statement to that effect shall be entered on the European firearms pass.

Comment: This disposition limits the derogation as concerns hunters and marksmen who do not need a prior authorisation for firearms they possess while travelling with a view to engaging in their activities. Indeed, they will have to obtain an authorisation for those firearms, which other Member States unilaterally included in their national lists of prohibited firearms or these subject to authorisation.

Taking into account the Member States’ right to modify firearms categories via their national legislations, it could be concluded that there is no EU common list of firearms.

In the context of the report referred to in Article 17, the Commission in consultation with the Member States, will also consider the effects of applying the second subparagraph, particularly as regards its impact on public order and public security.

3. Under agreements for the mutual recognition of national documents, two or more Member States may provide for arrangements more flexible than those prescribed in this Article for movement with firearms within their territories.

Article 13

1. Each Member State shall communicate all useful information at its disposal concerning definitive transfers of firearms to the Member State to the territory of which such a transfer has been effected.

2. All information that Member States receive by way of the procedures laid down in Article 11 for transfers of firearms and in Article 7 (2) and Article 8 (2) for the acquisition and possession of firearms by non-residents shall be communicated, not later than the time of the relevant transfers, to the Member States of destination and, where appropriate, not later than the time of transfer to the Member States of transit.

3. For the purposes of the efficient application of this Directive, Member States shall exchange information on a regular basis. To this end, the Commission shall set up, by 28 July 2009, a contact group for the exchange of information for the purposes of applying this Article. Member States shall inform each other and the Commission of the national authorities responsible for transmitting and receiving information and for complying with the obligations set out in Article 11(4).

Comment: A number of articles focus on the relevance of information exchange, namely 4(4), 7(2), 8(2), 8(3), 11(4) 13, 15(3), 15(4), and 18. Thus former Article 13(3) required **Member States** to establish, by 1 January 1993 at the latest, networks for the exchange of information for the purposes of applying this Article.

Apparently these networks were not satisfactory; therefore amended version of Article 13(3) requires the **Commission** to set up a contact group for the purpose of information exchange. This group was effectively established, i.e. E02211 Group of contact (exchange of information) for application of the new Directive 2008/51/CE.

This consideration indicates the willingness of the Commission to create a discussion forum with larger degree of effectiveness, which will act as co-ordination framework for the application, and the enforcement of this Directive. The contact group will act as a place where specific proposals for improving the exchange of information would be examined in order to find solutions for difficulties issued from the application of this Directive³⁵.

Article 13a

1. The Commission shall be assisted by a committee.

³⁵ The list of authorities competent for communicating information can be consulted on http://ec.europa.eu/enterprise/regulation/goods/docs/dir91477/contact_points_directive_91-477-eeec.doc.

2. Where reference is made to this paragraph, Articles 5 and 7 of Council Decision 1999/468/EC³⁶ of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [] shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

Article 14

Member States shall adopt all relevant provisions prohibiting entry into their territory:

- of a firearm except in the cases defined in Articles 11 and 12 and provided the conditions laid down therein are met,
- of a weapon other than a firearm provided that the national provisions of the Member State in question so permit.

³⁶ Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission is available at the following website:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999D0468:EN:HTML>,
amended by Council Decision 2006/512/EC of 17 July 2006:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:200:0011:01:EN:HTML>.

CHAPTER 4 Final provisions

Article 15

1. Member States shall intensify controls on the possession of weapons at external Community frontiers. They shall in particular ensure that travellers from third countries who intend to proceed to another Member State comply with Article 12.
2. This Directive shall not preclude the carrying out of controls by Member States or by the carrier at the time of boarding of a means of transport.
3. Member States shall inform the Commission of the manner in which the controls referred to in paragraphs 1 and 2 are carried out. The Commission shall collate this information and make it available to all Member States.
4. Member States shall notify the Commission of their national provisions, including changes relating to the acquisition and possession of weapons, where the national law is more stringent than the minimum standard they are required to adopt. The Commission shall pass on such information to the other Member States.

Article 16

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

Comment: Former Article 16 required Member States to introduce sufficient penalties for failure to comply with the provisions adopted in accordance with this Directive.

Article 16 does not use the term “penalties” but the one of “rules on penalties”, which should be “effective, proportionate and dissuasive.”

It shall be noted that Commission’s initial proposition required Member States to set up as criminal offences the following conduct, provided that it was committed intentionally:

“ – *illicit manufacturing of firearms, their parts and components and ammunition;*
– *illicit trafficking of firearms, their parts and components and ammunition;*
– *falsifying or illicitly obliterating, removing or altering the markings on firearms required by Article 4(1).*

Such attempts, or participation as an accomplice in the latter shall also be considered as criminal offences, when committed intentionally.

These offences shall be punishable by a confiscation measure as provided for in Article 2 of Council Framework Decision 2005/212/JHA of 24 February 2005 on the Confiscation of Crime-Related Proceeds, Instrumentalities and Property”.

The European Parliament tried to modify 1st paragraph of Article 16, by adding a following subparagraph: “*The failure to carry a European firearms pass shall not be subject to custodial sentences*”. This provision aimed at protecting persons being lawfully in possession of weapon from eventual incarceration if they cannot present an EFP providing that they possess all necessary documents.

It shall be emphasised that this provision concerned, in particular, the travellers to the United Kingdom who should provide the original of their EFP six to eight weeks in advance, thereby permitting the local police to make all necessary procedures.

None of those provisions appears in Directive 2008/51/EC.

Nevertheless, the issue of establishment of sanctions for the infringement of European law remains sensitive. The main discord concerns the distribution of competences; in particular it

remains uncertain whether the establishment of sanctions constitutes a national competence or that of the EU.

Article 17

The Commission shall, by 28 July 2015, submit a report to the European Parliament and the Council on the situation resulting from the application of this Directive, accompanied, if appropriate, by proposals.

The Commission shall, by 28 July 2012, carry out research and submit a report to the European Parliament and the Council on the possible advantages and disadvantages of a reduction to two categories of firearms (prohibited or authorised) with a view to the better functioning of the internal market for the products in question by means of possible simplification.

The Commission shall, by 28 July 2010, submit a report to the European Parliament and the Council presenting the conclusions of a study of the issue of the placing on the market of replica firearms in order to determine whether the inclusion of such products within the scope of this Directive is possible and desirable.

Comment: It shall be emphasised that former Article 17 bounded the Commission with an obligation to submit a report to the European Parliament and to the Council concerning the situation resulting from the application of this Directive. Such report was submitted on December 15th, 2000.

This Report concerns 15 States members of the European Union including Austria, Finland and Sweden that joined the EU during the Fourth enlargement thereof on 1 January 1995³⁷.

Article 18

1. Member States shall, by 28 July 2010, bring into force the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such references are to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Comment: List of references to the national measures adopted by 15 Member States as concerns the implementation of Directive 91/411/EEC is included in Annex I of the Report of the Commission to the European Parliament and the Council of 15 December 2000 (see comment on Article 17).

Article 19

This Directive is addressed to the Member States. Done at Strasbourg, 21 May 2008.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

J. LENARČIČ

ANNEX I

I. For the purposes of this Directive, 'weapon' means:

- any firearm as defined in Article 1 of the Directive,
- weapons other than firearms as defined in national legislation.

II. For the purposes of this Directive, 'firearm' means:

A. Any object which falls into one of the following categories, unless it meets the definition but is excluded for one of the reasons listed in section III.

Category A - Prohibited firearms

1. Explosive military missiles and launchers.
2. Automatic firearms.
3. Firearms disguised as other objects.
4. Ammunition with penetrating, explosive or incendiary projectiles, and the projectiles for such ammunition.
5. Pistol and revolver ammunition with expanding projectiles and the projectiles for such ammunition, except in the case of weapons for hunting or for target shooting, for persons entitled to use them.

Category B - Firearms subject to authorization

1. Semi-automatic or repeating short firearms.
2. Single-shot short firearms with centre-fire percussion.
3. Single-shot short firearms with rimfire percussion whose overall length is less than 28 cm.
4. Semi-automatic long firearms whose magazine and chamber can together hold more than three rounds.
5. Semi-automatic long firearms whose magazine and chamber cannot together hold more than three rounds, where the loading device is removable or where it is not certain that the weapon cannot be converted, with ordinary tools, into a weapon whose magazine and chamber can together hold more than three rounds.
6. Repeating and semi-automatic long firearms with smooth-bore barrels not exceeding 60 cm in length.
7. Semi-automatic firearms for civilian use which resemble weapons with automatic mechanisms.

Category C - Firearms subject to declaration

1. Repeating long firearms other than those listed in category B, point 6.
2. Long firearms with single-shot rifled barrels.
3. Semi-automatic long firearms other than those in category B, points 4 to 7.
4. Single-shot short firearms with rimfire percussion whose overall length is not less than 28 cm.

Category D - Other firearms

Single-shot long firearms with smooth-bore barrels.

B. Any essential component of such firearms:

The breach-closing mechanism, the chamber and the barrel of a firearm which, being separate objects, are included in the category of the firearms on which they are or are intended to be mounted.

III. For the purposes of this Annex objects which correspond to the definition of a 'firearm' shall not be included in that definition if they:

(a) have been rendered permanently unfit for use by deactivation, ensuring that all essential parts of the firearm have been rendered permanently inoperable and incapable of removal, replacement or a modification that would permit the firearm to be reactivated in any way;

Comment: Former point (a) did not use the term “deactivation” but that of “application of technical procedures” which had to be guaranteed or recognised by an official body. Current point (a) introduces the procedure of deactivation that concerns not only a firearm as a whole but also its essential parts, which should be also rendered permanently inoperable and incapable of removal, replacement or a modification.

(b) are designed for alarm, signalling, life-saving, animal slaughter or harpoon fishing or for industrial or technical purposes provided that they can be used for the stated purpose only;

(c) are regarded as antique weapons or reproductions of such where these have not been included in the previous categories and are subject to national laws.

Member States shall make arrangements for the deactivation measures referred to in point (a) to be verified by a competent authority in order to ensure that the modifications made to a firearm render it irreversibly inoperable. Member States shall, in the context of this verification, provide for the issuance of a certificate or record attesting to the deactivation of the firearm or the apposition of a clearly visible mark to that effect on the firearm. The Commission shall, acting in accordance with the procedure referred to in Article 13a (2) of the Directive, issue common guidelines on deactivation standards and techniques to ensure that deactivated firearms are rendered irreversibly inoperable.

Comment: Article 9 of the Protocol determines the general principles of deactivation that include following:

“(a) All essential parts of a deactivated firearm are to be rendered permanently inoperable and incapable of removal, replacement or modification in a manner that would permit the firearm to be reactivated in any way;

(b) Arrangements are to be made for deactivation measures to be verified, where appropriate, by a competent authority to ensure that the modifications made to a firearm render it permanently inoperable;

(d) Verification by a competent authority is to include a certificate or record attesting to the deactivation of the firearm or a clearly visible mark to that effect stamped on the firearm.”

Pending coordination throughout the Community, Member States may apply their national laws to the firearms listed in this Section.

IV. For the purposes of this Annex:

- (a) 'short firearm' means a firearm with a barrel not exceeding 30 centimetres or whose overall length does not exceed 60 centimetres;
- (b) 'long firearm' means any firearm other than a short firearm;
- (c) 'automatic firearm' means a firearm which reloads automatically each time a round is fired and can fire more than one round with one pull on the trigger;
- (d) 'semi-automatic firearm' means a firearm which reloads automatically each time a round is fired and can fire only one round with one pull on the trigger;

ANNEX I

- (e) 'repeating firearm' means a firearm which after a round has been fired is designed to be reloaded from a magazine or cylinder by means of a manually-operated action;
- (f) 'single-shot firearm' means a firearm with no magazine which is loaded before each shot by the manual insertion of a round into the chamber or a loading recess at the breech of the barrel;
- (g) 'ammunition with penetrating projectiles' means ammunition for military use where the projectile is jacketed and has a penetrating hard core;
- (h) 'ammunition with explosive projectiles' means ammunition for military use where the projectile contains a charge which explodes on impact;
- (i) 'ammunition with incendiary projectiles' means ammunition for military use where the projectile contains a chemical mixture which bursts into flame on contact with the air or on impact.

ANNEX II

EUROPEAN FIREARMS PASS

The pass must include the following sections:

- (a) identity of the holder;
- (b) identification of the weapon or firearm, including a reference to the category within the meaning of the Directive;
- (c) period of validity of the pass;
- (d) section for use by the Member State issuing the pass (type and references of authorizations, etc.);
- (e) section for entries by other Member States (authorizations to enter their territory, etc.);
- (f) the statements:

'The right to travel to another Member State with one or more of the firearms in categories B, C or D mentioned in this pass shall be subject to one or more prior corresponding authorizations from the Member State visited. This or these authorizations may be recorded on the pass.

The prior authorization referred to above is not in principle necessary in order to travel with a firearm in categories C or D with a view to engaging in hunting or with a firearm in categories B, C or D for the purpose of taking part in target shooting, on condition that the traveller is in possession of the firearms pass and can establish the reason for the journey.'

Where a Member State has informed the other Member States, in accordance with Article 8 (3), that the possession of certain firearms in categories B, C or D is prohibited or subject to authorization, one of the following statements shall be added:

'A journey to . . . (State(s) concerned) with the firearm . . . (identification) shall be prohibited.'
'A journey to . . . (State(s) concerned) with the firearm . . . (identification) shall be subject to authorization.'